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Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM ROBERT BIRDSEYE,
WILLIAM RICHARD BIRDSEYE,
Appellants, Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
Appellee, Respondent,

NOTICE OF APPEAL AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Counsel for Petitioners:

Thomas A. Crawford, Jr.
Suite 500. Triangle Bldg.
701 Smithfield Street
Pittsburgh, PA 15222

PA I.D. #30215

(412) 355-0888

171 pp

QUESTION PRESENTED FOR REVIEW

Did the Pennsylvania Courts misapply Title 18, United States Code, §2516(2) by permitting the Commonwealth of Pennsylvania to conduct an electronic surveillance of the petitioners' wire communications for crimes not enumerated in that section and which posed no danger to life, limb nor property as required by that section authorizing States to conduct wire interceptions? Does this stretch the federal statute beyond its legislative intent by state statutes which are less restrictive than the federal statute?

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NOTICE OF APPEAL AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The petitioners/appellants William Robert Birdseye and William Richard Birdseye, file this pleading as a notice of appeal and in the alternative as a petition for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Pennsylvania entered in this proceeding on 18 January 1996. The opinion of the Supreme Court of Pennsylvania is not as yet officially reported; however, a copy of that opinion is attached in the appendix below. The opinions of the trial court and the Pennsylvania Superior Court are also attached as is the opinion of the United States Court for the Western District of Pennsylvania which held the wire interception which is the subject of this appeal to have violated the terms of Title 18, United States Code, §2516(2) in a related case that was reversed on procedural grounds by the United States Court of Appeals for the Third Circuit. In ruling that the Pennsylvania Wiretapping and Electronic Surveillance Statute when applied to the Pennsylvania Corrupt Organization Statute overcame the requirement of the federal statute that the offense for which the wire interception was sought must be a danger to life, limb or property by reference to a legislative finding that two incidents of almost any minor crime was a danger to property in Pennsylvania, the

Supreme Court of Pennsylvania interpreted their statute in a fashion repugnant to Title 18, United States Code, §2516(2). Thus, the state statute as interpreted by the highest court in the state is repugnant to a federal statute permitting a direct appeal by the appellants/petitioners.

Thus, out of an abundance of caution, the appellants/petitioners have pleaded alternatively as they wish to appeal, but if this Honorable Court should disagree with appellate jurisdiction they wish this pleading to be considered to be a petition for a Writ of Certiorari.

STATEMENT OF JURISDICTION

From a final order adjudicating the petitioners guilty and sentencing them, the defendants took their appeal by authority of Title 42, Pennsylvania Consolidated Statutes, §742 to the Superior Court of Pennsylvania. The petitioners then petitioned the Supreme Court of Pennsylvania to hear their appeal and review the decisions of the courts below. Its jurisdiction was based upon Title 42, Pennsylvania Consolidated Statutes, §724 which provides jurisdiction for review of all final orders of the Superior Court by allowance of appeal. The Supreme Court of Pennsylvania granted allowance of appeal in this matter as to one issue -- that is whether the Commonwealth's wire interception complied with federal statutes. The Supreme Court of Pennsylvania reviewed the decisions below and affirmed them but on differing grounds and rejecting the decision of the United States Court for the Western District of Pennsylvania which held the wire interception to be illegal in a related tax case which decision was reversed by the United States Court of Appeals for the Third Circuit for unrelated procedural reasons.

From the decision of the Supreme Court of Pennsylvania the petitioners hereby appeal or in the alternative seek review of that

judgment of the highest court of Pennsylvania pursuant to Title 28, United States Code, §1257(3) and an appeal is hereby sought pursuant to Title 28, United States Code, §1257(2)

STATEMENT OF FACTS

Although a somewhat lengthy case, the facts surrounding the alleged criminal activity were rather simple and straightforward, In early 1986 the defendant William Robert Birdseye (Senior) was approached by a Commonwealth informant Gina Rizzo (Source Two) with a proposition that he get into the escort and bachelor party business, something he had never done before. She misrepresented to him that if he did no soliciting himself that he would be committing no crime. Another informant (Source One), suspected to be Marie Romanelle, provided rather indirect and conclusory terms that Senior was using prostitution himself or running a prostitution ring. Using this information, the police placed pen registers (devices to record the numbers called by a telephone) on Senior's telephones. Then combining the phone call information, the information from the two informants, false information from a mental patient, Deborah Piovesan, Senior's former wife, and another informer whose name the police cannot recall (Source Three) and some observations and a large amount of speculation, the Police and District Attorney of Westmoreland County obtained authority to intercept the wire communications of the defendants, Senior's friend Renee Garcia, and

the defendant's employees. At no time was any act of prostitution or solicitation asserted in the affidavit and application for the wire interception nor was any mention made of any danger to life, limb or property set forth pursuant to Title 18, United States Code, §2516(2) as required.

Utilizing the wire interceptions the police purchased magazines, movies and video tapes from the defendants' adult bookstores, seized a recorder and some electronics from one of the stores, searched each store and the defendants' home and seized all the defendants' records, computers, token machines and video games along with much other material.

The records were turned over to the Internal Revenue Service for investigation. The Internal Revenue Service then issued summons for all of the defendants' financial records and sought to have the United States Court for Western District of Pennsylvania enforce the summons through its contempt powers. Judge Mencer ruled that the IRS summons were derived from an illegal interception of wire communications as prostitution, obscenity and corrupt organizations are not among the offenses for which States could obtain authorization to investigate by means of interceptions of wore communications as set forth in Title 18, Unites States Code, §2516(2). See Appendix at pp. A-94 through A-130, reported as *United States v. Millstone*

Enterprises, 684 F. Supp. 867 (WPDA 1988).

In the meantime, the Commonwealth, utilizing an investigative grand jury and over defendants' and the aggrieved witnesses' objections, which the Court of Common Pleas declined to hear, proceeded to interrogate the defendants' employees, dancing girls and alleged patrons about the contents of their telephone calls with the defendants which had been intercepted.

The defendants William Richard Birdseye (Junior) and William Robert Birdseye (Senior) and others were then charged with corrupt organizations (the adult bookstores), obscenity (one video tape and one magazine), prostitution (permitting male prostitutes to use the video booths at the stores), wiretapping and possession of wire intercepting devices used on their own phones, and Senior alone was charged with conspiracy and female prostitution (concerning the bachelor parties). The defendants filed pre-trial motions for discovery, particulars, a severance of counts and defendants, to suppress the interception and searches and for other forms of relief.

The trial court granted defendants' motion to suppress based upon Judge Mencer's decision. The Commonwealth appealed to Superior Court. However, when Judge Mencer's decision was reversed on other (procedural) grounds this Superior Court remanded the case to the trial court for reconsideration of its decision. The trial

court reversed itself and denied the suppression motion. The trial court also denied the defendants' motion for discovery of the identity and whereabouts of the informants (CI 1), (CI 2), and (CI 3) and refused to compel the Commonwealth to specify the acts, dates and locations of the crimes upon which the Commonwealth would rely in proving their case. Defendants' motion for severance was denied as well and the disparate crimes of corrupt organizations, wire tapping, prostitution, possession of wire tapping equipment and obscenity were to go to trial at once (the trial court severed a conspiracy count pursuant to a motion in limine). During the presentation of its case on the motion to suppress, the defense offered testimony that the first informer (CI 1) was Marie Romanelle, who had told defendant Birdseye Senior that she had told neither Trooper Gentile nor Trooper Fielder any of the information contained in the affidavit of probable cause for the interception of wire communications. Although counsel was permitted to question Mrs. Romanelle, he was not permitted to ask her whether or not she told the information in the affidavit to the State Police, the purpose for which she was called.

At trial the Commonwealth, through a series of intercepted telephone calls and witnesses, demonstrated that the defendants indeed ran four adult bookstores in Allegheny, Westmoreland and Bedford Counties. The stores in Bedford and Westmoreland

Counties had dancing booths, and all of the stores had booths in which a patron could view a video tape or a movie in privacy. Each store had token machines which dispensed four tokens for a dollar. The tokens would be used to play the video tape or movie for the patron. Some of the booths had holes in the walls through which the police speculated patrons would engage in sexual conduct, although there was no testimony that such conduct ever took place. At trial only two male prostitutes testified that they engaged in sex with several customers whom they conducted to the Boulevard Book Store in Pittsburgh for which they were paid by the customer. Both acknowledged that they did not reveal the nature of their liaison to the clerk on duty and neither knew nor had any contact with either defendant. Neither of the male prostitutes ever paid the clerk nor the defendants for permission to use the booth for prostitution. The Commonwealth also called George Troianos, a former clerk at the bookstores. Over objection, he testified that at one time he overheard males discussing having enough money for dinner after spending some time in a movie booth. Over objection he also testified that he heard "Edna May" complain that he had paid ten dollars for sex and her partner turned out to be gay. The Commonwealth also called as witnesses a number of female dancers. Each testified that the defendants' never asked them to have sex with anyone. they stated

that no solicitation was permitted at the bookstores and that they, on occasion, would solicit some customers at the bachelor parties, they did so out of the defendants' presence. They did say that they would play with the bachelor party customers by sitting on their laps and putting their arms about them. The Commonwealth and defendants also called patrons of the bachelor parties. No patron testified that he arranged with the defendants for sex. The patrons called by the Commonwealth testified that they did not have sex with any of the girls. In fact, the only individual who testified that Senior offered him sex was Trooper Marsinetti. He testified that Senior offered him intercourse or fellatio for money. However, he told Trooper Funk that Senior only said that the girls would "take care" of all of the men for $200.00 and that neither he nor any of the other troopers were successful in soliciting the girls or Mr. Birdseye Senior. Sam Anthony, a customer who arranged a bachelor party with Mr. Birdseye Senior through Gina Rizzo, the government informant (Source Two), stated that he arranged to have sex with Katie and/or Haley by himself and in no way arranged for sex with Mr. Birdseye Senior. This was the "extensive and widespread" organized prostitution enterprise to which the courts below referred in justifying some imagined harm to property.

In order to prove obscenity the Commonwealth offered only

one magazine and one video tape. The defendants offered Dr. Chauncey Rawleigh, a minister and a professor at Indiana University of Pennsylvania, who testified that he had studied sexual practices and behavior in Pennsylvania and elsewhere and that through formal and informal study he could state that the state wide population would not find that the subject matter depicted sexual conduct in a patently offensive manner. Again the purchase of one magazine and one video tape demonstrate the tiny nature of this enterprise which could in no way harm the property of anyone any more than any retail store. There were no allegations of evading taxes or of any economic loss to anyone. The petitioners sought to illustrate the harmlessness of these materials by offering into evidence examples of explicit materials shown, advertised or offered for lease of sale in everyday stores, cinema theaters, video tape rental and sales outlets, newsstands, mail order and cable and satellite television. None of the offered material was obtained in an "adult bookstore" or other adult establishment. The trial court limited the defendants to several publications and but one hour's run of video tape. The defendants offered to show the films in their entirety and to offer about six hours of video and audio tapes obtained from such sources of films which made the Commonwealth's movies purchased at the petitioners' stores look absolutely tame in terms of explicit sex, violence or "perversions."

The Commonwealth offered evidence that the police had intercepted conversations in which the defendants were overheard discussing the installation of a recorder to monitor their stores' telephones in order to find out who was committing criminal acts at the stores. The defendants proved that all employees were forewarned that their conversations would be monitored by management through a store manual.

After the defendants had rested but before the case went to the jury, the defendants' attorney received a letter from Robert Hapchuck, a prisoner at the State Correctional Institute in Mercer, Pennsylvania. It contained much evidence that Trooper Gentile, the Commonwealth's case agent and leading witness who conducted the investigation and wire interception in this matter had attempted to plant or entrap the defendants with child pornography through the use of Mr. Hapchuck as an inside employee. Feeling that such testimony could be vital to the defendants' case as it demonstrated a clear bias and ruthless prejudice on the part of the primary prosecution witness, the defense asked to reopen its case and to obtain the person of Mr. Robert Hapchuck from prison to testify. The motions were denied and Mr. Hapchuck was not permitted to testify.

During its charge to the jury the trial court stated:

> To a certain extent you will in your deliberations, I presume, compare the various materials, but

> ultimately, ladies and gentlemen, it is for you to determine what the community standards were at the time. You may conclude, after you reviewed this evidence, that none of it was obscene, applying the rules that I just gave you, or you can conclude that all of it is obscene.

The defendants objected to the instruction as no decision as to the obscenity of the defendants' exhibits was called for.

The defendants were convicted of all charges and sentenced outside the guidelines to prison terms of three (Junior) and five (Senior) years. The defendants objected to the excessive sentences as no aggravating circumstances were demonstrated.

From the judgment and sentence of the Court of Common Pleas the defendants took appeals and from the Superior Court's affirmance of those judgments petition this Honorable Court for allowance of appeal. The Pennsylvania Supreme Court granted allowance of appeal as to the single issue of the propriety of the wire interception under the federal wire communications statute, Title 18, United States Code, §2516(2). On 18 January 1996 the Supreme Court of Pennsylvania affirmed the courts below and based its decision upon a legislative finding that prostitution and obscenity were harmful to the economy of the Commonwealth of Pennsylvania due to a finding that these offenses involved organized crime in an extensive enterprise.

ARGUMENT I

THE INTERCEPTION OF THE DEFENDANTS' WIRE COMMUNICATIONS VIOLATED TITLE 18, UNITED STATES CODE, §2516(2)

As a result of the holdings of the Supreme Court of the United States in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed,2d 576 (1967); *Osburn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 429 (1966); *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1966), Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act which is codified in Title 18, United States Code, §2510 et seq. In order to limit electronic surveillance to cases of some significance, the nature of the crimes to be investigated by wiretapping was limited by Title 18, United States Code, §2516. State applications for interceptions of wire communications were limited by §2516(2) which provides:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney for any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception

> may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs or other crime dangerous to life, limb or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

As prostitution, obscenity, corrupt organizations, wiretapping and possession of wiretapping equipment are not among the enumerated crimes for which a state may intercept wire communications, it must be determined whether or not they fall under the general provision "...other crime dangerous to life, limb or property..." In order to determine what Congress meant by those terms one must look at the legislative history of the act. See Senate Report No. 1097, 90th Congress, 2nd Session, *United States Code, Congressional and Administrative News* (1968) p. 2234 in which it is made clear that only "intrinsically serious" crimes or those associated with organized crime among those for the investigation of which Congress permitted the interception of wire communications. In fact it was made clear that the investigation of sexual crimes such as "fornication and adultery" were excluded from State wire interception. Since fornication and adultery involve exactly the same dangers to life, limb or property as prostitution (the only added element to make fornication or adultery prostitution is the remuneration required by the

prostitute, the crime of prostitution by logical extension of this legislative history is also beyond the scope of §2516(2). See *People v. Shapiro*, 50 N.Y.2d 897, 906-908 (Court of Appeals, 1980); *United States v. Millstone Enterprises*, 684 F. Supp. 867, 870-875 (WPDA, 1988), reversed on other grounds, 684 F.2d 21 (3rd Cir. 1989), a case involving the same wire interception and same applications as the case at bar. Although the trial court and Superior Court made much of the AIDS disease in stating that prostitution is dangerous to life and limb, other fatal venereal diseases such as syphilis were well known to Congress when it chose to exclude sexual crimes such as fornication from §2516(2) coverage and to the Pennsylvania Legislature when it required a showing of danger to life, limb or property for inclusion of prostitution within its wire tap statute. See Title 18, Pennsylvania Consolidated Statutes, §5708(2) which permits applications for wire interceptions for certain offenses under Title 18 as follows:

> (2) Under this title, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:
>
> * * * *
>
> Section 5902 (relating to prostitution and related offenses...

Clearly then, States cannot legislate broader authority to intercept wire communications in criminal investigations than the authority granted

to them by §2516(2). In keeping with that grant of limited authority Pennsylvania enacted its wiretap statute to conform with Federal requirements. Additionally, in order to fulfill its intended purpose, this provision must be strictly construed as it involves serious intrusions into the privacy of citizens. See *United States v. Vest*, 813 F.2d 477, 483-484 (1st Cir. 1987). Here, the trial court and Superior Court attempt to assert that the dangers of sexually transmitted disease "focused" upon by the Commonwealth and the trial court but neither sworn to as a part of the affidavit accompanying the wire interception application nor demonstrated by proof at the suppression hearing, has been present throughout history. Venereal disease was prevalent in 1968-1969 when the Omnibus Crime Control and Safe Streets Act was being considered as it was in 1978 when the Pennsylvania Wiretapping and Electronic Surveillance Control Act was enacted and is today. Clearly, that was not the type of danger to life or limb that Congress intended to protect by investigatory interceptions of citizens' communications. The "crime" in the offense of prostitution is charging money for sex, not having sex which is not a crime. The "danger to life and limb" relied upon by the Commonwealth and trial court (by judicial notice -- a rather new element added to the "four corners" requirement that all facts amounting to probable cause must be contained in the affidavit), although never made a part of the

probable cause affidavit nor the subject of proof before the court, is equally present in criminal as non-criminal sex which was specifically eliminated by the legislative history of the federal act.

Additionally, the Pennsylvania wiretapping statute provides that several offenses may be investigated by interceptions of wire communications "...where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year." One of those crimes is prostitution. Thus, in cases where prostitution is demonstrated to be dangerous to life, limb or property it may be investigated by interception of wire communications. See Title 18, Pennsylvania Consolidated Statutes, §5708(2). In the Commonwealth of Pennsylvania it has long been established that probable cause must be established by a written affidavit. See Rule 2003, Pennsylvania Rules of Criminal Procedure which provides:

> (a) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority. The issuing authority, in determining whether probable cause has been established, *may not consider any evidence outside the affidavits*.
>
> (b) At any hearing on a motion for the return or suppression of evidence, or for suppression of the fruits of evidence, obtained pursuant to a search warrant, *no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (a)*.

In the case at bar there is no mention of danger to anyone or anything

in the affidavits. Dangers to life, limb or property make up no part of the affidavit; thus, the allegations of prostitution do not meet the standards set forth in Title 18, Pennsylvania Consolidated Statutes, §5708(2) and the trial court's "judicial notice" of the hazards of AIDS being greater in instances of prostitution than in other consensual sexual behavior are without evidence in the affidavits or in court. Prostitution where no danger to life, limb or property is set forth is not subject to investigation through interceptions of wire communications by either the Pennsylvania statute or the federal standard.

It would appear that attempts to justify the wire interception on the basis of corrupt organizations should fail for similar reasons. First, an attempt to call obscenity a danger to life, limb or property is merely absurd. Second, prostitution, if more than one instance is demonstrated may qualify as a corrupt organization, but must have proved the additional element of danger to life, limb or property to be investigated through the interception of a suspect's wire communications as we have pointed out above.

Third, if the Pennsylvania statute is read to include all prostitution or all obscenity to be investigable by means of wire interceptions, then the Pennsylvania Statute is an unauthorized attempt to broaden the scope of Title 18, United States Code, §2516(2) and

would be unconstitutional due to the supremacy clause of the Constitution of the United States. Clearly, the Procrustean stretching of the Pennsylvania and Federal statutes in which the Pennsylvania Courts indulged *dehors* any evidentiary justification in either the affidavit or at any hearing fails to satisfy either the standards required by the Commonwealth or the United States. To extend the trial court's logic, the sale of two *Playboy"* magazines could justify the interception of wire communications because Pennsylvania included obscenity within its corrupt organizations statute. Furthermore, the Pennsylvania Wiretapping and Electronic Surveillance Control Act does not include violations of Title 18, Pennsylvania Consolidated Statutes, §911, engaging in a pattern of racketeering activity, as one of the crimes for which electronic surveillance can be authorized. See Title 18, Pennsylvania Consolidated Statutes, § 5708. The Commonwealth relies on Title 18, Pennsylvania Consolidated Statutes, § 5708(5) which reads:

> Any offense set forth under the act of November 15, 1972 (P.L. 1227, No. 272.[6]

---

[6] Section 3923 of this title (sic.).

Actually the statute referred to as P.L. 1227, 272 is not Title 18, Pennsylvania Consolidated Statutes, §3923 as no such section exists. It was § § 3923 of the former and repealed Pennsylvania Corrupt

Organizations Act at Title 18, Purdons Pennsylvania Statutes, § 3923. That section, prior to its repeal, long before this investigation, was significantly different than Title 18, Pennsylvania Consolidated Statutes, § 911. For example, the former statute includes no reference to obscenity as a covered racketeering activity where the present statute includes all obscenity provisions, including selling or display of a *Playboy* magazine as a racketeering activity. Compare Title 18, Purdons Pennsylvania Statutes, § 3923(1) with Title 18, Pennsylvania Consolidated Statutes, § 911(h)(1)(i). Obviously, these insignificant offenses are not those anticipated by Congress as crimes "dangerous to life, limb or property..." See Senate Report No. 1097, supra, at p. 2234. The old act was repealed and Title 18, Pennsylvania Consolidated Statutes, § 911 has never been substituted within the provisions of the Pennsylvania Wiretapping and Electronic Surveillance Control Act as one of the offenses for which the electronic interception of wire or oral communications could be authorized. Of course, to do so would have violated the provisions of Title 18, United States Code, § 2516(2) as has already been discussed.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the appellants' convictions should be reversed and the Commonwealth prohibited from using the wire interception in question nor any evidence derived therefrom in the future.

Respectfully submitted,

Thomas A. Crawford, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the within brief has been served upon:

District Attorney
Allegheny County Courthouse
Pittsburgh, PA 15219

by hand delivery on 18 April 1996.

_____

[J-113-1995]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: Nos. 57 and 58 W.D. Appeal : Docket 1994
Appellee	: Appeal from Order of Superior : Court dated March 4, 1994, at : Nos, 652 and 1612 PGH 1991, : affirming judgments of
v.	: sentence of the Court of : Common Pleas of Allegheny : County, Criminal Division,
WILLIAM ROBERT BIRDSEYE and WILLIAM RICHARD BIRDSEYE,	: dated March 4, 1991, at Nos. : CC 8800570 and CC 8800571 : 432 Pa. Super. 167, : 637 A.2d 1036 (1994)
Appellants	: ARGUED: September 18, 1995

OPINION

JUSTICE ZAPPALA **DECIDED: JANUARY 18, 1996**

The Appellants were found to have violated 18 Pa.C.S. §§911(b) (3) (Corrupt Organizations), 5902(b) (7) (Promoting Prostitution), 5903 (a) (2) (Obscene Materials), 5703 (1) (Interception of Wire Communications), and 5705 (1) (Possession of Intercepting Devices). The sole issue in this appeal is whether the Appellants' communications were intercepted in violation of 18 U.S.C §2516(2), such that the evidence gathered from the wiretaps should have been

suppressed.

The wiretaps at issue here were authorized by a judge of the Superior Court in April of 1986 pursuant to the Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701 et seq. The affidavits supporting the request described an investigation of prostitution and related offenses, corrupt organizations, and conspiracy. In seeking suppression, the Appellants argued that because there was no showing that the crimes under investigation were "dangerous to life, limb, or property," they were outside the types of crimes that the Federal Wire Interception Act (Federal Act) granted states the authority to investigate by means of wiretaps.

The Federal Act controls the use of wiretaps by federal agencies and also imposes restrictions on their use by the states. Appropriate state officers are authorized to employ wiretaps

> when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicaable state statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

18 U.S.C. § 2516(2) (emphasis added).

The Wiretapping and Electronic Surveillance Control Act (Pennsylvania Act) is the "applicable state statute" authorizing

interceptions in Pennsylvania. During the period relevant to this case, that statute provided that prosecutors could

> make written application to any Superior Court Judge for an order authorizing the interception of a wire or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation involving suspected criminal activities when such interception may provide evidence of the commission of any of the following offenses...
>
> (2) Under this title, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year...
>
> Section 5902 (relating to prostitution and related offenses)...
>
> (5) Any offense set forth under the Act of November 15, 1972 (P.L. 1227, No. 272).
>
> (6) Any conspiracy to commit any of these offenses set forth in this section.

18 Pa.C.S. §5708(a) as amended December 2, 1983.

By virtue of the Supremacy Clause of the United States Constitution, Article VI, Section 2, the Federal Act preempts the ability of the states to adopt legislation that would be less restrictive in allowing interceptions. See Commonwealth v. Doty, 345 Pa. Super. 374, 498 A.2d 870 (1985), cert. denied, 479 U.S. 853, 107 S.Ct. 185.

The common pleas court ruled that authorization for the interceptions would not have been valid had the charges under investigation been limited to the crimes of simple prostitution or corrupt organizations for the purpose of selling pornographic materials. The court reasoned that these crimes would not constitute

dangerous crimes and thus would be beyond the scope of wiretap investigation permitted by the Federal Act. The court concluded that the interceptions were properly authorized, however, because the investigation extended to the crime of corrupt organizations for the promotion of prostitution. Taking judicial notice of the existence of "a health crisis brought on by a sexually transmitted virus which causes the fatal disease known as AIDS," the court determined that in such circumstances the promoting of anonymous sexual intercourse for profit represented a danger to life. The court emphasized the vast scale of the enterprise under investigation in distinguishing fornication, adultery, and individual acts of prostitution, which might involve the same type of health risk but would not be subject to investigation by wiretapping.

The Appellants argue that the court erred in supplying the element of "danger to life, limb, or property" by the device of judicial notice. They also argue that the affidavits supporting the wiretap applications contained no evidence from which such danger could be found. Accordingly, the investigation did not meet the requirements of the Federal Act for the type of investigation in which interception of communications could be authorized.

The Commonwealth counters each of these arguments, but offers a more fundamental argument as to why the authorization was

valid under the Pennsylvania Act and within the scope allowed by the Federal Act.

Section 5708(a) (5) of Title 18 of the Pennsylvania Consolidated Statutes designates "[a]ny offense set forth under the Act of November 15, 1972 (P.L. 1227, No. 272)" as a type of criminal activity that may be investigated by means of interception of communications. This Act amended Pennsylvania's first Corrupt Organizations statute, the Act of December 8, 1970 (P.L. 874, No. 276, §§ 1 to 9. When the Crimes Code was enacted pursuant to the plan to codify all of the statutory law of the Commonwealth, the Corrupt Organizations statute was repealed and reenacted without substantial change, Act of December 6, 1972 (P.L. 1482, No. 334, §1), effective June 6, 1973, and now appears at 18 Pa.C.S. §911.

The rules of statutory construction provide that "[w]henever a statute is repealed and its provisions are at the same time reenacted in the same or substantially the same terms by the repealing statute, the earlier statute shall be construed as continued in active operation." 1 Pa.C.S. §1962. Therefore, notwithstanding the repeal, it is appropriate to construe the reference to Act 272 of 1972 in 18 Pa.C.S. §5708(a)(5) as being a reference to the Corrupt Organizations statute

now found at 18 Pa.C.S. § 911.[1] The result is that the Pennsylvania

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[1]. We note that the General Assembly has also provided as a rule of statutory construction that

> Whenever any existing statute, incorporated into and repealed by a code, is also amended by other legislation enacted by the same General Assembly, such separate amendment shall be construed to be in force, notwithstanding the repeal by the code of the statute such other legislation amends, and such amendment shall be construed to prevail over the corresponding provisions of the code.

1 Pa.C.S. §1952. Because the original Corrupt Organizations statute was amended by Act 272 of 1972, and the same General Assembly also repealed that statute and enacted the Crimes Code, this rule would suggest that the amendment contained in Act 272 of 1972 would be in force, prevailing over the corresponding provisions of the Crimes Code in 18 Pa.C.S. § 911.

However, Section 4 of the act by which prior criminal statutes were repealed and the Crimes Code was adopted, Act of December 6, 1972, P.L. 1482, No. 334, expressly provided that this rule of construction "shall not be applicable to any provision of Title 18 of the Consolidated Pennsylvania Statutes (relating to crimes and offenses) as added by this act, except Article G (relating to miscellaneous offenses) of Part II (relating to definition of specific offenses)." Thus even though the Corrupt Organizations statute was amended by the same General Assembly that repealed and incorporated it into a code, the amendment is not to be construed as prevailing over the corresponding provisions of the code.

In Commonwealth v. Flashburg, 237 Pa. Super. 424, 352 A.2d 185 (1974), Superior Court noted that Section 4, read literally, did not prohibit the application of 1 Pa.C.S. § 1952. Section 4 stated that "section[] 72 . . . of the Statutory Construction Act shall not be applicable to any provision of Title 18 . . ." Section 72 of the Statutory Construction Act was the predecessor to 1 Pa.C.S. § 1952. The Crimes Code legislation, including Section 4, was drafted at a time when Section 72 was still in force, presumably with the expectation that when it became effective Section 72 would still be in force. However, the Crimes Code did not become effective until June of 1973. In the interim, on December 6, 1972,

Act authorizes prosecutors to make application for interception of communications to investigate criminal activity as defined in the Corrupt Organizations statute. Unlike subsection (a) (2), however, subsection (a) (5) contains no prefatory language limiting its application to circumstances "where such offense is dangerous to life, limb or property." Consequently, where, as here, interceptions are sought to provide evidence of the commission of an offense set forth under the Corrupt Organizations statute, there need not be a separate showing of dangerousness for the authorization to be valid under the

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Section 72 of the Statutory Construction Act had been repealed and replaced by 1 Pa.C.S. § 1952. However, Section 4 of the Crimes Code legislation was not revised to reflect this change and continued to refer to Section 72, which had been repealed.

Superior Court decided Flashburg on other grounds, and so did not reach the "difficult question" of "whether a court, as a matter of interpretation, can correct this error." 237 Pa. Super. at 431 n. 6, 352 A.2d at 188 n. 6. As with the principal statutes under consideration in the text, application of 1 Pa.C.S. § 1962 leads us to conclude that a reference to a statute which has been repealed and reenacted in substantially similar form should be construed as a reference to the reenacted statute.

Finally, we note that the General Assembly removed any doubt as to its intention by amending the Wiretapping and Electronic Surveillance Control Act in 1988 to include section 911 (relating to corrupt organizations in subsection (1) of section 5708(a), i.e., the subsection, listing offenses that may be investigated by means of wiretaps, which does not contain the prefatory language "where such offense is dangerous to life, limb or property."

Pennsylvania Act.[2]

This leaves the question whether the interceptions in question were nevertheless beyond the scope of the Federal Act. The Appellants maintain that because "corrupt organizations" is not among the crimes specifically enumerated in the Federal Act, prosecutors seeking wiretap authorization to investigate corrupt organizations violations must make a separate showing that the underlying activities which make up the "pattern of racketeering activity" are "dangerous to life, limb, or property." The common pleas court accepted this argument when it ruled that "the operation of a Corrupt Organization for the purpose of selling pornography is not a crime dangerous to life and that, to the extent that the Pennsylvania Corrupt Organization statute [sic] authorizes wiretaps for the purpose of uncovering evidence of a corrupt organization promoting the sale of pornography, it exceeds the permissible scope of the wiretap legislation permitted by Congress, 18 U.S.C. §2516(2)." We disagree.

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2. The analysis assumes that, as with any of the other elements of the application for authorization, the assertion of an investigation of corrupt organizations violations is bona fide and not merely a ruse to investigate by wiretaps a crime not included in the Act. The Superior Court judge to whom the application is presented must make this assessment in deciding whether to authorize the interceptions or not. In the present case there is no question that the application described a legitimate investigation of the Appellants for violations of the corrupt organizations statute, as they were ultimately convicted thereunder.

The legislative history of the Federal Act, found in Senate Report No. 1097, 90th Cong. 2d Sess., U.S. Code Cong. and Admin. News 1968, pp. 2187-2188, provides the following insight:

> All other crimes designated in the state statute would have to be dangerous to life, limb, or property, and punishable by imprisonment for more than one year. This limitation is intended to exclude such offenses as fornication and adultery, which do not involve danger to life, limb, or property. The term property, however, is not to be read restrictively. For example, the activities of organized crime in cigarette bootlegging which poses a substantial threat to the revenue of some cities and states, could be made a designated offense if the penalty were high enough.

(Emphasis added.)

Pennsylvania's Corrupt Organizations statute begins by setting forth findings of fact on which the General Assembly's enactment of it was based. 18 Pa.C.S. §911(a). Among those findings are that organized crime "annually drains billions of dollar from the national economy," "exists on a large scale within the Commonwealth . . . engaging in the same patterns of unlawful conduct which characterize its activities nationally," infiltrates legitimate business with techniques of "violence, intimidation, and other forms of unlawful conduct," and thereby constitutes "a substantial danger to the economic and general welfare of the Commonwealth of Pennsylvania."[3] The harms

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3. The findings state in full that

(1) organized crime is a highly sophisticated, diversified, and widespread phenomenon which annually drains billions

identified in these findings are unmistakably similar to the type of harm used as an example in the Senate Report quoted above. On this basis, we conclude that the common pleas court read the Federal Act too narrowly in ruling that an application to intercept communications

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> of dollars from the national economy by various patterns of unlawful conduct including the illegal use of force, fraud and corruption;
>
> (2) organized crime exists on a large scale within the Commonwealth of Pennsylvania, engaging in the same patterns of unlawful conduct which characterize its activities nationally;
>
> (3) the vast amounts of money and power accumulated by organized crime are increasingly used to infiltrate and corrupt legitimate businesses operating within the Commonwealth, together with all of the techniques of violence, intimidation, and other forms of unlawful conduct through which such money and power are derived;
>
> (4) in furtherance of such infiltration and corruption, organized crime utilizes and applies to its unlawful purposes laws of the Commonwealth of Pennsylvania conferring and relating to the privilege of engaging in various types of business and designed to insure that such businesses are conducted in furtherance of the public interest and general economic welfare of the Commonwealth;
>
> (5) such infiltration and corruption provide an outlet for illegally obtained capital, harm innocent investors, entrepreneurs, merchants and consumers, interfere with free competition, and thereby constitute a substantial danger to the economic and general welfare of the Commonwealth of Pennsylvania; and
>
> (6) in order to successfully resist and eliminate this situation, it is necessary to provide new remedies and procedures.

in the investigation of a corrupt organization must include a separate showing of danger to life.[4]

This conclusion is bolstered by examination of the overall structure of the Federal Act. The first part of the section dealing with authorization for interceptions applies to the Attorney General and various deputies and assistants. It authorizes application to federal judges for approval of interceptions to obtain evidence of certain enumerated offenses. Significantly, the federal Racketeer Influenced and Corrupt Organizations statute is among them. See 18 U.S.C. §

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4. Our analysis leads to the same conclusion with respect to the decision in United States v. Millstone Enterprises, Inc., 684 F.Supp. 867 (W.D.Pa. 1988), rev'd on other grounds, 864 F.2d 21 (3d Cir. 1988), relied on by the appellants. That case was a proceeding for enforcement of an Internal Revenue Service summons served on six corporations. The summons was issued in connection with an investigation of William Robert Birdseye, the appellant at no. 57 W.D. Appeal Docket, 1994, who was the president of the six corporations. Birdseye and the corporations refused to respond to the summons, asserting that the investigation derived from illegal wiretaps, the same wiretaps involved in the appeals now before this Court. The District Court agreed that "the state crimes for which the wiretaps were approved to investigate are not offenses within the scope of section 2516(2) . . . and any evidence derived therefrom should not be used in a proceeding before a government body." 684 F.Supp. at 870. Noting that the Pennsylvania Act included prostitution as an offense that could be investigated by wiretaps only where it is "dangerous to life, limb or property," the court concluded that "an alleged corrupt organizations violation, where a non-violent prostitution related offense is the underlying 'racketeering activity,' may [not] be permitted to bootstrap prostitution-related conduct into the category of crimes dangerous to life or limb." Id. at 871. For the reasons stated in the text, we find this analysis of the Federal Act to be too narrow.

2516(1) (c). Also among the enumerated crimes for which federal prosecutors may seek approval for interceptions is "any felony violation of chapter 71 (relating to obscenity) of this title. 18 U.S.C. § 2516(1) (i).

The next part of this section dealing with authorization for interceptions is analogous and applies to state prosecutors and state judges. Of necessity, given the enormous number of state laws that would be involved, the Congress could not in this section provide a similarly detailed enumeration with citation to specific statutes. Hence the generic reference to certain crimes and the catch-all "other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year."

Under the Appellants' interpretation of the Federal Act, state prosecutors seeking authorization for an interception would face a burden (to show dangerousness) that their federal counterparts, investigating the same type of crime, would not. We perceive no reason for adopting an interpretation that would produce such an anomalous result. We hold, therefore, that the Pennsylvania Act, in allowing wiretaps to investigate activities proscribed by the Corrupt Organizations statute, does not exceed the authority granted to the states by 18 U.S.C. § 2516(2).

For the foregoing reasons the order of the Superior Court

affirming the judgments of sentence is affirmed.

Mr. Justice Montemuro, who was sitting by designation, did not participate in the decision of this case.

JUDGEMENT ENTERED THIS 18TH DAY OF JANUARY, 1996,

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DEPUTY PROTHONOTARY

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA APPELLEE	:	
VS	:	NO. 652 PITTSBURGH, 1991
WILLIAM ROBERT BIRDSEYE APPELLANT	:	
COMMONWEALTH OF PENNSYLVANIA APPELLEE	:	
VS	:	NO.1612 PITTSBURGH,1991
WILLIAM RICHARD BIRDSEYE APPELLANT	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Allegheny County be, and the same is hereby affirmed.

BY THE COURT:

DEPUTY PROTHONOTARY

DATED: March 4, 1994

J. A52020/93

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WILLIAM ROBERT BIRDSEYE, Appellant	:	No. 652 Pittsburgh, 1991

Appeal from the Judgment of Sentence entered March 4, 1991, Court of Common Pleas, Allegheny County, Criminal Division at No. CC8800570A

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	
WILLIAM RICHARD BIRDSEYE, Appellant	:	No. 1612 Pittsburgh, 1991

Appeal from the Judgment of Sentence entered March 4, 1991, Court of Common Pleas, Allegheny County, Criminal Division at No. CC8800571A

BEFORE: ROWLEY, P.J., JOHNSON and MONTGOMERY, J.J.

OPINION BY JOHNSON, J.: FILED: MARCH 4, 1994

We are asked to determine whether prostitution is an offense dangerous to life or limb within the sweep of both federal and state wiretapping statutes so as to warrant wiretapping for investigations of conduct promoting prostitution. We find, on the record presented on this appeal, that the trial court committed no error in concluding that promoting prostitution does involve danger to life or limb, and that the

Pennsylvania Wiretapping and Electronic Surveillance Control Act was not violated. Accordingly, we affirm the judgments of sentence.

A jury found the Birdseyes guilty of the following charges: corrupt organizations, 18 Pa.C.S. § 911 (b) (3); promoting prostitution, 18 Pa.C.S. § 5902 (b) (7); selling obscene materials (two counts), 18 Pa.C.S. § 5903 (a) (2); interception of wire communications, 18 Pa.C.S. § 5703 (1); and, possession of intercepting devices, 18 Pa.C.S. § 5705 (1). Post-trial motions were filed and denied. Father was sentenced to not less than five nor more than twenty years' imprisonment, and Son was sentenced to not less than three nor more than twenty years' imprisonment. Motions to modify their sentences were denied, and these appeals followed.

The trial judge, the Honorable Raymond A. Novak, summarized the facts as follows:

> The defendants are the owner-managers of several adult bookstores in Western Pennsylvania, one of which was located in Allegheny County. They were accused of maintaining a Corrupt Organization by using the bookstores for prostitution and the sale of pornography. The Commonwealth called many witnesses, including undercover state troopers, former employees of the Birdseyes' store, former customers, former associates and even prostitutes who used the Birdseyes' facilities. Additionally, the Superior Court of Pennsylvania authorized a wiretap of various telephones and the police obtained hundreds of taped telephone calls, a great number of which were introduced into evidence in the case.
>
> The Commonwealth's evidence tended to show that the Birdseyes were intimately involved in the operation of the

bookstores. Two male prostitutes testified that they used the defendants' bookstores for purposes of engaging in prostitution. The former manager of one of the stores testified that the use of the facilities by prostitutes was open and notorious; moreover, he testified about the alteration of the video booths with "glory holes" for purposes of engaging in sexual contact between the video booths. Many of the tapes indicated that [Son] would add holes and have some covered up from time to time; the carpenter who cut the holes between the video booths also testified.

A state trooper testified that he purchased a magazine entitled, "Tortured Ladies," and a video entitled, "Breeders," from the Boulevard Bookstore in downtown Pittsburgh. . . .

A separate operation stemming from the bookstores involved only [Father]. He managed a "bachelor party" operation. Many of the tapes consisted of recorded phone calls between [Father] and prospective customers about hiring dancers for bachelor parties. [Father] told the callers that there would be an additional charge if the caller wanted the dancers to "play" after the party. Dancers testified about their performance at various parties. Two customers testified about the bachelor parties which they arranged through [Father]. Moreover, state troopers testified about an undercover operation in which they arranged for dancers and also, for an extra $200, for the dancers to "play" afterwards.

Finally, the defendants were charged with illegally taping the conversations of their employees, and in this regard, [a t]rooper testified about recovering the recording devices from their stores during the execution of a search warrant.

The defendants testified in their own behalf and indicated that they did not promote prostitution and ran a legitimate business.

Trial Court Opinion, dated November 7, 1991, at 3-5 (citations omitted).

On appeal, the Birdseyes argue that (1) the evidence was insufficient to sustain the verdict; (2) the verdict was against the

weight of the evidence; (3) the interception of their wire communications violated Title 18 of the United States Code; (4) the interception of the wire communications was without sufficient probable cause; (5) the trial court abused its discretion by denying their motion to sever; (6) they were denied sufficient discovery; (7) they were denied sufficient particulars; (8) they were denied compulsory process; (9) they were denied the right to confront witnesses; (10) their right to present their case was limited; (11) the jury was erroneously instructed; and, (12) the sentence was improper.

The Birdseyes first assert that there was insufficient evidence to sustain the charges of corrupt organizations, promoting prostitution, obscenity and wiretapping. The Birdseyes also contend that Father was entrapped by government agents concerning his corrupt organizations charge based upon female prostitution. In presenting their argument on these issues, however, the appellants neither cite to the record nor do they cite to any case law to support their allegations. As a result, we will not review this argument and find that these issues have been waived. Pa.R.A.P. 2119 and 2132; Commonwealth v. Shaw, 494 Pa. 364, 370 n.3, 431 A.2d 897, 900 n.3 (1981) (failure to elaborate on mere assertion in brief that admission of confession violated fifth amendment results in waiver); Commonwealth v. Badman, 398 Pa.Super. 315, 322-23 n.2 and n.3,

580 A.2d 1367, 1370 n.2 and n.3 (1990) (issue waived if argument is mere assertion); Commonwealth v. Long, 367 Pa.Super. 190, 197-98, 532 A.2d 853, 857 (1987), appeal denied, 518 Pa. 617, 541 A.2d 744 (1988) (we will not review issues that are not properly developed by citation to the record and reference to supporting case law).

As their second issue, the Birdseyes maintain that the verdict was against the weight of the evidence for the same reasons that the evidence was insufficient to sustain their convictions. However, sufficiency of the evidence claims are distinct from weight of the evidence claims, as there are different standards of review as well as separate remedies involved. Commonwealth v. Whiteman, 336 Pa.Super. 120, 485 A.2d 459 (1984). Indeed, in making a claim that the verdict was against the weight of the evidence, it is conceded that there was sufficient evidence to sustain the verdict. Commonwealth v. Murray, 408 Pa. Super. 435, 439, 597 A.2d 111, 113 (1991), appeal denied, 529 Pa. 668, 605 A.2d 333 (1992), citing Commonwealth v. Taylor, 324 Pa.Super. 420, 471 A.2d 1228 (1984). Moreover, the Birdseyes failed to provide any separate argument in support of the weight of the evidence issue. Because the Birdseyes failed to distinguish between their sufficiency and weight of the evidence claims and presented no argument regarding the weight of the evidence, we deem their weight of the evidence issue waived.

See Long, supra; see also Whiteman, supra (boilerplate allegation that verdict was against weight of evidence waives issue).

In their third issue, the Birdseyes argue that the trial court erred in finding that a judge of this Court, the Honorable Zoran Popovich, lawfully issued search warrants allowing the interception of wire communications. They contend that Title III of the Omnibus Crime Control & Safe Streets Act of 1968 (Title III), 18 U.S.C. § 2510-2520, prohibited the authorization of the wiretaps. Title III provides that state investigating agencies may utilize wiretaps:

> when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crimes dangerous to life, limb, or property, and punishable by imprisonment for more than one year . . . .

18 U.S.C. § 2516 (2). The Pennsylvania Wiretapping and Electronic Surveillance Control Act (Wiretap Act), 18 Pa.C.S. § 5701 et seq., sets forth the following:

> § 5708. Order authorizing interception of wire or oral communications
>
> The Attorney General...may make written application to any Superior Court Judge for an order authorizing the interception of a wire or oral communication...when such interception may provide evidence of the commission of any of the following offenses, or may provide evidence aiding in the apprehension of the perpetrator or perpetrators of any of the following offenses:

* * *

(2) Under this title, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:

* * *

Section 5902 (relating to prostitution and related offenses)

* * *

(5) Any offense set forth under the act of November 15, 1972 (P.L. 1227, No. 272) [Corrupt Organizations statute].

18 Pa.C.S. § 5708. The trial court found that the crimes listed by the Commonwealth in the wiretap request satisfied the requirement of 18 U.S.C. § 2516 (2) that the crime be "dangerous to life, limb, or property." Judge Novak explained:

> In its brief opposing the motion to suppress, the Commonwealth asked this court to take the judicial notice of the Surgeon General's report on AIDS [Acquired Immunodeficiency Syndrome]. After considering briefs on this issue, this court declined to take judicial notice of the entire report, but did take notice of the fact that at the time of the Commonwealth's application to the Superior Court for the wiretap (1986), our country was experiencing a health crisis brought on by a sexually transmitted virus which causes the fatal disease known as AIDS. We concluded that this fact was so widely known in our society by the mid-eighties that to ignore it would be placing one's head in the sand.

Trial Court Opinion, supra at 14. "The doctrine of judicial notice is intended to avoid the necessity for the formal introduction of evidence in certain cases when there is no real need for it, -- where a fact is so

well established as to be a matter of common knowledge." Commonwealth v. Brown, 312 Pa.Super. 383, 385, 458 A.2d 1012, 1012-13 (1983) (citing cases). Although the Birdseyes do not dispute the fact that AIDS was a health crisis in 1986, they do take exception to the judge's decision to take judicial notice of this fact. The appellants assert that prostitution does not constitute a crime dangerous to life, limb or property, and, therefore, a wiretap should not have been authorized.

The spread of the fatal disease AIDS has caused an enormous health crisis in this country, hence, we cannot find that the trial court erred in taking judicial notice of that fact. As a result, we are unable to conclude that the trial court erred in its determination that a prostitution business, such as the one operated by the appellants, was a danger to life. Under the facts presented in this case, we are constrained to conclude that the wiretaps, which permitted further investigation of the prostitution activities, did not violate either the federal or state statutes.

In support of their argument that prostitution is not a crime dangerous to life, the Birdseyes rely on People v. Shapiro, 50 N.Y.2d 747, 409 N.E.2d 897 (1980) This case, however, is factually distinguishable. In Shapiro, the defendant was convicted of sodomy and endangering the welfare of a minor. He was also charged with promoting prostitution as a result of a single incident in which other

adults brought young male prostitutes to his home to engage in sexual behavior. This information was learned through court-ordered wiretapping on defendant's telephone. The court, however, reversed his conviction holding, inter alia, that the wiretap exceeded the bounds of 18 U.S.C. § 2516 (2). The majority reasoned that because Title III was designed to permit state wiretaps for a "class of major offenses that were either 'intrinsically serious or *** [were] characteristic of the operations of organized crime[,]'" the wiretap was declared invalid because the crime involved, a single event of promoting prostitution, was not a crime dangerous to life or limb. Shapiro, supra at ___, 409 N.E.2d at 907. We, however, agree with the trial court that Shapiro is inapposite. Shapiro dealt with only a single incident of promoting prostitution, and "not a vast criminal enterprise promoting anonymous sex for profit...." Trial Court Opinion, supra at 20.

The Birdseyes also cite to United States v. Millstone Enterprises, Inc. 684 F.Supp. 867 (W.D.Pa. 1988), as support for their argument that organized prostitution is not a crime dangerous to life or limb. That case involved the same wire interceptions here under review. The distinguished district court judge, Glenn E. Mencer, denied an application for a contempt sanction and ruled that a corrupt organization involved in prostitution was indistinguishable from the crimes considered in Shapiro. On appeal, the United States

Court of Appeals for the Third Circuit reversed. United States v. Millstone Enterprises, Inc., 864 F.2d 21 (1988). It held that the question regarding the legality of the wiretap had been raised in the district court in an earlier, summons enforcement proceeding and the district court's failure to rule on that issue when first raised precluded the court from considering the legality of the wiretap in the subsequent contempt proceeding. Id. at 23. The court of appeals expressly refused to rule upon the merits of the contention that the wiretap was illegal or upon the question whether such illegality could be raised in subsequent proceedings. Id. at 24 n.1. The court of appeals remanded the matter to the district court for entry of an appropriate civil contempt sanctioning order. Id. at 24.

We conclude that neither of these cases, upon which the Birdseyes principally rely, provide support for the contention that Judge Novak erred in refusing to suppress the wiretap evidence received as a result from the warrants authorized by Judge Popovich.

Next, the Birdseyes claim that the interception of their wire communications was without sufficient probable cause in the affidavit. In this case, the District Attorney sought authorization to intercept the telephone communications of the Birdseyes concerning offenses in violation of 18 Pa. C.S. § 5902 (prostitution and related offenses) and 18 Pa.C.S. § 911 (corrupt organizations). The standard for

determining whether probable cause existed for an order authorizing interception of telephone communications is the same as that used to determine probable cause for search warrants. Commonwealth v. Doty, 345 Pa.Super. 374, 397, 498 A.2d 870, 881-82 (1985), cert. denied, 479 U.S. 853, 107 S.Ct. 185, 93 L.Ed.2d 119 (1986). In determining probable cause for search warrants, Pennsylvania has adopted the "totality of the circumstances" test set forth in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and followed in Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921 (1985). The Birdseyes would have us apply the pre-Gray two-prong test set forth in Aquilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), which required that the issuing authority see, on the face of the affidavit of probable cause, both the informant's basis for his knowledge and independent facts showing the reliability of the informant. This we cannot do. The test now utilized for analyzing warrants is as follows:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate

> had a "substantial basis for...conclud[ing] that probable cause existed."

Commonwealth v. Karns, 389 Pa.Super. 58, 61, 566 A.2d 615, 616 (1989), appeal denied, 525 Pa. 632, 578 A.2d 927 (1990) (citations omitted).

Similarly, in an application for a wiretap, the Commonwealth must establish probable cause to believe that (1) the person whose communication is to be intercepted has committed an offense as provided in the state wiretap law, 18 Pa.C.S. §5701 et seq., (2) communications concerning that offense will be transmitted, and (3) such communications will be intercepted on the facility under surveillance. Doty, supra at 397, 498 A,2d at 882; see also 18 Pa.C.S. § 5710. In "reviewing the adequacy of the application to support the issuance of an order of authorization, we will interpret the application in a common sense manner, not overly technical, with due deference to the findings of the issuing authority." Doty, supra at 395, 498 A.2d at 881.

Our review of the application in the present case persuades us that the application contained probable cause which was adequate to support the issuance of a wiretap order. The District Attorney first alleged that Father promoted prostitution in violation of § 5902 and violated the corrupt organizations statute by being involved in a pattern of racketeering activities, i.e., the business of female prostitution.

Two confidential informants, Source One and Source Two, supplied information to the police on previous occasions. Their information led to the arrest and conviction of various individuals relative to charges of prostitution and related offenses. Source One stated specifically that he/she had dealt with Father both in person and by telephone, and had personally observed and/or participated in conversations with Father and that the telephone was used to make arrangements for females to be used in the prostitution business. Moreover, Source One indicated that the phone numbers given to him/her were Father's numbers, a fact substantiated by police investigation of phone records. In addition, Source Two stated that he/she had spoken to Father in person and by telephone, at numbers provided by Father, about integrating a female into the prostitution business. Father had previously indicated to Source Two that he (Father) was involved in the prostitution business and was planning an expansion of that business. Also, officers in the organized crime unit made arrangement with Father for a party with two females. After arriving with the females, Father then solicited the officers by offering sex with the females in exchange for money.

The District Attorney also asserted that Father and Son violated the corrupt organization statute by engaging in various racketeering activities, i.e., distributing obscene materials in the adult bookstore

business and promoting prostitution in the bookstores. Information set forth in the application for the wiretaps established the following: (1) Father and Son owned four adult bookstores, and Son was active in managing the stores; (2) police officers purchased several obscene magazines and videos in the Birdseyes' bookstores; and (3) prostitutes picked up customers and brought them to the bookstores or met customers within the bookstores, performed sex acts in the privacy of booths located in the stores, and accepted pay for their services. Further, it was alleged that this prostitution activity was open and notorious; known to both employees and appellant/owners of the stores.

Based on the information provided in the application for the wiretaps, we find that there was a substantial basis for concluding that probable cause existed to order the interception of the telephone communication. See Karns, supra; Doty, supra.

Next, we turn to issues 5, 6, and 7, in which the Birdseyes argue that they were improperly denied a motion to sever counts, denied sufficient discovery and denied sufficient particulars. After a thorough review of the record, the briefs of the parties, the applicable law and the Opinion of the trial court, it is our determination that there is no merit to issues 5, 6, and 7 raised in the Birdseyes' appeals. The Opinion of the trial judge, the Honorable Raymond A. Novak,

comprehensively discusses and adequately disposes of the questions presented. As to issue 7, we would only add the more recent case of Commonwealth v. Hassine, 340 Pa.Super. 318, 490 A.2d 438 (1985), to show that the trial court properly denied the appellants' request for a more detailed bill of particulars. Accordingly, we affirm issues 5, 6 and 7 on the basis of the trial court Opinion at 26-28, 33-40.

The Birdseyes, in their eighth and ninth issues, respectively, allege, without elaboration, that they were denied compulsory process when the court refused their request to reopen the case in order to call a witness, and were denied the right to confront their accusers. Again, we find that the appellants have failed to adequately develop an argument regarding these claims, and they also fail to cite to any authority that supports their assertions. See Commonwealth v. Long, supra. Furthermore, in the confrontation issue, the Birdseyes cite to various pages in the trial transcript, but in essence ask that we develop an argument for them. It is not this Court's function or duty to become an advocate for the appellants. Commonwealth v. Sanford, 299 Pa.Super. 64, 445 A.2d 149 (1982). Thus, we conclude that these contentions have been waived. See Commonwealth v. Badman, supra.

Next, the Birdseyes contend that the right to present their case

was limited. Specifically, they claim the trial court restricted their proof of community standards regarding obscenity by limiting their comparable items to only one hour of videotape. Here, the Commonwealth objected to the use of videotapes to demonstrate community standards. This objection, however, was overruled, and the trial court decided to place a time limit of one hour on the video presentation. A review of the record shows that defense counsel had no objection to this time limitation and, moreover, stated that he "[didn't] want to see more than one hour." N.T., May 9-22, 1990, at 1193. Indeed, the jury was shown a one hour video composed of various excerpts from movies, and defense counsel made no objection or complaint about the time limitation. N.T., June 8-21, 1990, at 2336-39. Defense counsel's acceptance of the one hour time limit, without objection, constitutes waiver. See Commonwealth v. Purcell, 403 Pa.Super. 342, 589 A.2d 217 (1991), appeal denied, 529 Pa. 657, 604 A.2d 248 (1992).

In their eleventh issue, the Birdseyes claim that the trial court erroneously instructed the jury regarding the law of obscene materials and corrupt organizations.

> When reviewing a claim that the trial court erred in instructing the jury, the scope of appellate review is whether the court committed a clear abuse of discretion or an error of law which controlled the outcome of the case. This court will look at the charge in its entirety against the background of evidence in the case to

> determine whether error was made and whether it was prejudicial.

Butler v. Kiwi, S.A., 412 Pa.Super. 591, 596, 604 A.2d 270, 272 (1992), appeal denied, 531 Pa. 650, 613 A.2d 556 (1992) (citation omitted). First, the Birdseyes contend that the jury was confused when the trial court instructed that the jury could find all of the materials shown to be obscene. On the contrary, a review of the charge shows that the trial court instructed the jury as follows:

> To a certain extent, you will in your deliberations, I presume, compare the various materials, but ultimately...it is for you to determine what the community standards were at this time. You may conclude, after you have reviewed the evidence, that none is obscene...or you can conclude that all of it is obscene.
>
> Of course you are not charged with that conclusion in your responsibilities, but only to determine whether Breeders and Tortured Ladies are obscene. You could also conclude that some of it is obscene and some of it is not obscene.

N.T., June 8-21, 1990, at 2746-47. The jury also was instructed that they should look at all of the evidence presented by the parties as well as utilizing their own experience. Id. at 2747.

The Birdseyes' additional contention, that the trial court improperly instructed the jury as to corrupt organizations, is equally without merit. The judge told the jury that they must find that the appellants (1) were "associated with a certain enterprise; in this case, a chain of adult bookstores; and [(2)]...participated directly or indirectly

in the conduct of the affairs of that chain of adult bookstores through a pattern of racketeering." Id. at 2748. The court's charge followed the standard jury instructions and accurately explained the law of corrupt organizations. See Pennsylvania Standard Criminal Jury Instructions 12.911.; Bailey v. Pennsylvania Electric Co., 409 Pa.Super. 374, 598 A.2d 41 (1991), appeal denied, ___ Pa. ___, 627 A.2d 177 (1993).

Having reviewed the instructions as a whole, we find that the trial court adequately explained the law and properly charged the jury. Butler, supra; Bailey, supra. Thus, the trial court committed no error of law or abuse of discretion when giving its charge.

Finally, the Birdseyes allege that their sentences were improper and should have fallen within the mitigated range of available sentences. Since this contention concerns the discretionary aspects of sentencing, the requirements of Pa.R.A.P. 2119 (f) which requires that a "concise statement of reasons relied upon for allowance of appeal" with respect to the discretionary aspects of the sentence be set forth in appellants' brief immediately preceding the argument section. Only if it is determined that a substantial question has been presented as to the appropriateness of the sentence under the Sentencing Code, 42 Pa.C.S. § 9781 (b), may this court review the manner in which the sentencing court exercised its discretion.

Tuladziecki, supra. Because the appellants have neglected to include a 2119(f) statement and the Commonwealth, aware of the omission, made proper objection in its brief, we are precluded from addressing the merits of appellants' challenge. Commonwealth v. Miller, 414 Pa.Super. 56, 606 A.2d 495 (1992), appeal denied, 531 Pa. 639, 611 A.2d 711 (1992), citing Tuladziecki, supra; Commonwealth v. Krum, 367 Pa.Super. 511, 533 A.2d 134 (1987).

Based on the foregoing reasons, the judgments of sentence for the Birdseyes are affirmed.

Judgments of Sentence AFFIRMED.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

	:	CRIMINAL DIVISION
COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	
	:	CC No. 8800570
WILLIAM ROBERT BIRDSEYE	:	
	:	
and	:	
	:	CC No. 8800571
WILLIAM RICHARD BIRDSEYE, Defendants	:	

OPINION

Filed by the
HONORABLE
RAYMOND A. NOVAK

Counsel of Record:

Thomas A. Crawford,Jr
Esquire
500 Triangle Building
701 Smithfield Street
Pittsburgh, PA 15222

Kemal Mericli, Esquire
Office of the District
Attorney
401 Courthouse
Pittsburgh, PA 15219

November 7, 1991

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: CRIMINAL DIVISION
vs.	:
WILLIAM ROBERT BIRDSEYE	: CC No. 8800570
and	:
WILLIAM RICHARD BIRDSEYE, Defendants	: CC No. 8800571

OPINION

NOVAK, J. November 7, 1991

The defendants, William Robert Birdseye and William Richard Birdseye, were found guilty by a jury on June 21, 1990, of the following charges: Corrupt Organization, 18 Pa.C.S. §911 (b)(3); Promoting Prostitution, 18 Pa.C.S. §5902(b) (7); Obscene Materials (two counts), 18 Pa.C.S. §5903(a)(2); Interception of Wire Communications, 18 Pa.C.S. §5703(1); and Possession of Intercepting Devices, 18 Pa.C.S. §5705(1). After post trial motions

were filed, argued and denied, we sentenced the defendants on March 4, 1991, as follows: William Robert Birdseye was sentenced to serve a period of incarceration of not less than five years nor more than twenty years and pay a fine of $25,000. William Richard Birdseye was sentenced to serve a period of incarceration of not less than three years nor more than twenty years and pay a fine of $25,000. Timely motions to modify sentence were denied. This appeal follows.

Facts

The defendants are the owner-managers of several adult bookstores in Western Pennsylvania, one of which was located in Allegheny County. They were accused of maintaining a Corrupt Organization by using the bookstores for prostitution and the sale of pornography. The Commonwealth called many witnesses, including undercover state troopers, former employees of the Birdseyes' store, former customers, former associates and even prostitutes who used the Birdseyes' facilities. Additionally, the Superior Court of Pennsylvania authorized a wiretap of various telephones and the police obtained hundreds of taped telephone calls, a great number of which were introduced into evidence in the case.

The Commonwealth's evidence tended to show that the

Birdseyes were intimately involved in the operation of the bookstores. Two male prostitutes testified that they used the defendants' bookstores for purposes of engaging in prostitution (N.T. 5/25/90, pp. 1648-1660, 1666-1672). The former manager of one of the stores testified that the use of the facilities by prostitutes was open and notorious; moreover, he testified about the alteration of the video booths with "glory holes" for purposes of engaging in sexual contact between the video booths (N.T. 5/25/90, pp. 1412-1427). Many of the tapes indicated that Mr. Birdseye, Jr. would add holes and have some covered up from time to time; the carpenter who cut the holes between the video booths also testified (N.T. 5/25/90, pp. 1513-1520).

A state trooper testified that he purchased a magazine entitled, "Tortured Ladies," and a video entitled, "Breeders," from the Boulevard Bookstore in downtown Pittsburgh in May and June of 1986. These became Commonwealth Exhibits 3 and 4 (N.T. 5/25/90, pp. 1275-1276). A former bookkeeper testified as to the way in which the inventory was managed (N.T. 5/25/90, pp. 1318-1323).

A separate operation stemming from the bookstores involved only Mr. Birdseye, Sr. He managed a "bachelor party" operation. Many of the tapes consisted of recorded phone calls between Mr.

Birdseye and prospective customers about hiring dancers for bachelor parties. Mr. Birdseye told the callers that there would be an additional charge if the caller wanted the dancers to "play" after the party. Dancers testified about their performance at various parties (N.T. 5/25/90, pp.1576-1585, 1604-1615, 1633-1634). Two customers testified about the bachelor parties which they arranged through Mr. Birdseye (N.T. 5/25/90, pp. 1331-1343, 1357-1364). Moreover, state troopers testified about an undercover operation in which they arranged for dancers and also, for an extra $200, for the dancers to "play" afterwards (N.T. 5/25/90, pp. 1244-1265).

Finally, the defendants were charged with illegally taping the conversations of their employees, and in this regard, Trooper Gerald Fielder testified about recovering the recording devices from their stores during the execution of a search warrant (N.T. 5/25/90, pp. 1365-1372).

The defendants testified in their own behalf and indicated that they did not promote prostitution and ran a legitimate business. Moreover, they called an expert, Chancy Rawleigh, who testified concerning community standards for obscenity.

Discussion

I.

The defendants claim that the evidence derived from the wire interceptions authorized by the Honorable Zoran Popovich of the Superior Court, Judge Robert Dauer of Allegheny County and Judge Gilfert Mihalich of Westmoreland County should have been suppressed. Our decision as to whether the applications adequately set forth probable cause for the interceptions are explicated in hundreds of pages on the record and need not be recounted here. Suffice it to say that the sufficiency of each application was argued ad longe et latum during the several weeks of pre-trial proceedings. The record in this regard is quite extensive.

In this section of their concise statement, the defendants also argue that Pennsylvania's Wiretapping Act, 18 Pa.C.S. §5701 et seq., violates Section 2516(2) of the United States Code to the extent that it authorizes interceptions for the crime of corrupt organizations where the predicate crime is prostitution.

Procedural History

This motion has a somewhat tortured history. In a tax case arising out of the same investigation, the Honorable Glenn Mencer of the United States District Court denied the United States government's application for civil contempt holding that the wiretap authorized by Judge Zoran Popovich violated the United States Code. On August 2, 1988, this court granted the defendants' motion to suppress the wiretap evidence holding that Judge Mencer's ruling was binding on this court as he had interpreted a federal statute which preempts state law in the area of wiretapping.

The Commonwealth appealed that order to the Pennsylvania Superior Court. Subsequently, the Third Circuit Court of Appeals reversed Judge Mencer's ruling on procedural grounds. The defendants complied with the United States government's subpoena and the federal matter ended. Upon application of the Commonwealth, the Superior Court remanded the case to this court for reconsideration. The matter was argued and briefed. For the reasons set forth below, this court ultimately denied the defendants' motion to suppress the wiretap evidence.

Federal and State Legislation

The Federal Wire Interception Act provides that the states may pass statutes authorizing the interception of wire or oral communications:

> ...when such interception may provide or have provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year... 18 U.S.C. §2516(2).

The legislative history of this section offers some insight into its meaning:

> This limitation is intended to exclude such offenses as fornication and adultery, which do not involve danger to life, limb, or property. The term "property," however, is not to be read restrictively. For example, the activities of organized crime in cigarette bootlegging which poses a substantial threat to the revenue of some cities and states, could be made a designated offense if the penalty were made high enough. (Senate Report No. 1097, 90th Cong. 2d Sess. U.S. Code Cong. and Admin, News 1968, p. 2187-88).

The Pennsylvania legislature subsequently enacted the Pennsylvania Wiretapping and Electronic Surveiliance Control Act, 18 Pa.C.S. §5701, et.seq. That act approves wiretapping for two crimes relevant to this case: (1) Corrupt Organizations; and (2) Prostitution where the offense is dangerous to life, limb, or property

and punishable by imprisonment for more than one year. As neither of these offenses is one for which surveillance is specifically permitted by the federal wiretap act, this court had to determine whether these offenses came within the category of offenses "dangerous to life, limb, or property" for which surveillance is also permitted by the federal wiretap legislation.

The legislative history of Pennsylvania's wiretap statute makes it clear that it was the intent of the legislature to comply with the federal wiretap act. Representative Scirica indicated in discussions prior to passage of the bill that certain crimes including prostitution could form the basis for a wiretap authorization only when these crimes were found to be dangerous to life or property in order to comply with the federal wiretap act. House Legislative Journal, September 21, 1978, p. 3153. By authorizing a wiretap for prostitution where it is found to be dangerous to life, it is clear that the Pennsylvania Legislature envisioned cases in which prostitution could, in fact, be dangerous to life. 18 Pa. 5708(a) (2).

It is also clear that the legislature viewed the crime of corrupt organizations as quite another matter. The configuration of the wiretap statute demonstrates that the legislature concluded that the crime of corrupt organizations was inherently dangerous. Corrupt organizations is the very first crime for which wiretapping is

permitted, and, unlike the crime of prostitution, there is no requirement that the court need make a finding that there is a danger to life or property when this crime forms the basis for wiretap application. This placement of corrupt organizations within the wiretap statute is consistent with the findings of fact of the general assembly in the Corrupt Organizations Act, 18 Pa. 911(a):

> (1) organized crime is a highly sophisticated, diversified, and widespread phenomenon which annually drains billions of dollars from the national economy by various patterns of unlawful conduct including the illegal use of force, fraud, and corruption;
>
> (2) organized crime exists on a large scale within the Commonwealth of Pennsylvania, engaging in the same patterns of unlawful conduct which characterizes its activities nationally;
>
> (3) the vast amounts of money and power accumulated by organized crime are increasingly used to infiltrate and corrupt legitimate businesses operating within the Commonwealth, together with all of the techniques of violence, intimidation, and other forms of unlawful conduct through which such money and power are derived;
>
> (4) in furtherance of such infiltration and corruption, organized crime utilizes and applies to its unlawful purposes laws of the Commonwealth of Pennsylvania conferring and relating to the privilege of engaging in various types of business and designed to insure that such businesses are conducted in furtherance of the public interest and the general economic welfare of the Commonwealth;
>
> (5) such infiltration and corruption provide an outlet for illegally obtained capital, harm innocent investors, entrepreneurs, merchants and consumers,

> interfere with free competition, and thereby constitute a substantial danger to the economic welfare of the Commonwealth of Pennsylvania; and
>
> (6) in order to successfully resist and eliminate this situation, it is necessary to provide new remedies and procedures.

In the tax case before Judge Mencer, the United States government argued that by designating prostitution as a form of racketeering activity in its corrupt organization statute, the Pennsylvania legislature has concluded that it is a form of organized crime which operates through the use of violence, force and intimidation. 18 Pa.C.S. §911(a). Judge Mencer dismissed this argument.

> We cannot agree that by including prostitution among its listing of 'racketeering activities,' the Pennsylvania legislature can thereby transform prostitution into a crime dangerous to life or limb. While prostitution might be conduct which often may lead to violence, it is not in and of itself dangerous to life or limb. U.S. v. Millstone Enterprises, U.S. Dst. Ct., W.Pa., No. 87-2406 at p. 10.

This court agrees with Judge Mencer's decision when it considers the matter as it was argued by the United States government in the case before him. The legislature cannot transform the non-violent crime of prostitution into a violent crime merely by denominating it a form of racketeering activity under the corrupt organization statute. While it is true that organized prostitution often involves the use of force or violence, there is no allegation in the

Commonwealth's affidavit for probable cause that such force or violence was used in the operation of the Birdseyes' alleged corrupt organization.

However, the principal argument upon which the Commonwealth of Pennsylvania relies in the matter before this court was apparently not raised before Judge Mencer, at least it is not dealt with in his opinion (although Judge Mencer's decision in this matter was reversed on procedural grounds, this court has taken his analysis into account in resolving the issues raised by the defendants). Unlike the argument of the United States government in the matter before Judge Mencer, the Commonwealth argued in the suppression hearing before this court that at the time of the Commonwealth's application in 1986, the crime of operating a corrupt organization promoting prostitution was dangerous to life in and of itself. While the United States government focused on the extrinsic dangers of prostitution in the case before the district court, the Commonwealth of Pennsylvania focused its arguments in the case before this court on the intrinsic dangers of prostitution.

Operating a Corrupt Organization for the Promotion of Prostitution in this Decade is a Crime Dangerous to Life

In its brief opposing the motion to suppress, the Commonwealth asked this court to take judicial notice of the Surgeon General's report on AIDS. After considering briefs on this issue, this court declined to take judicial notice of the entire report, but did take notice of the fact that at the time of the Commonwealth's application to the Superior Court for the wiretap (1986), our country was experiencing a health crisis brought on by a sexually transmitted virus which causes the fatal disease known as AIDS. We concluded that this fact was so widely known in our society by the mid-eighties that to ignore it would be placing one's head in the sand.

The affidavits allege in part that the defendants operated several adult bookstores in Western Pennsylvania, located in Pittsburgh, Murrysville and Yukon. The stores had video booths in which a patron could view videos rented at the store. The defendants had cut holes about 18 inches in diameter between the booths about three feet off the floor so that a customer in one booth could have sex with a customer in an adjoining booth. These holes were known as "glory holes." The affidavits allege that there was semen on the floors, walls and video screens, and that the booths had to be cleaned

two or three times a day.

The Commonwealth had originally advanced a somewhat novel theory of prostitution. It contended that the use of the booths for sex by two consenting adults constituted prostitution. Patrons of the bookstore purchased tokens which, when inserted in a coin slot in the booths, caused a video to be shown. While the video was playing, a red light shone above the booth. The patrons were permitted to use the booths as long as the light remained lit. The Commonwealth argued that because the consenting adults were required to use tokens to assure the privacy of the booths for sex, the defendants were engaged in sexual activity as a business. This court rejected this somewhat expansive theory of prostitution.

However, the Commonwealth also presented evidence that the defendants operated a corrupt organization for the purpose of promoting prostitution in the more traditional sense. The Crimes Code of Pennsylvania provides in pertinent part that:

> The following acts shall ... constitute promoting prostitution: ... (7) leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means; ... 18 Pa.C.S.A. §5902(b)(7).

The affidavits alleged that prostitutes picked up customers and

brought them to the bookstore or met customers within the bookstore itself, accepted pay for their services, and performed sex acts in the privacy of the booths. Further, there was evidence that this activity was open and notorious; that it was evident to the employees, and to the defendant/owners of the stores.

A second part of the alleged corrupt organization involved the bachelor party operation. The affidavits alleged that the bookstores also provided private booths in which customers could observe dancing girls. By inserting tokens into a slot, a screen would open revealing a scantily clad young woman behind a second plexiglass screen. The woman would dance suggestively for the customer. As the customers inserted cash "tips" in a slot beneath the screen, the dance would become more and more suggestive culminating ultimately in masturbation. The customers were free to masturbate in the booths and toilet paper was provided to clean off the semen. Once again, this activity does not, in this court's opinion, constitute prostitution.

However, the affidavits also established probable cause to believe that this dancing operation was intimately connected to a "bachelor party" operation which the Commonwealth alleges was nothing but a front for organized prostitution. Mr. Birdseye, Sr. had flyers available in the bookstores advertising the bachelor party operation. The customers called Mr. Birdseye, Sr. to arrange a party

and he would refer them to the video stores to "check out" the girls. He would also inform them that some girls would "play" and other girls would not. The price for "play" was extra. Mr. Birdseye, Sr. would then transport the girls to various motels and resort areas to perform for a group of men. After the dance, the girls would engage in sex acts with the attendees for an extra charge.

The affidavits also allege that the defendants operated a corrupt organization for purpose of selling pornographic magazines and videotapes, including child pornography. The court ruled that the affidavits failed to establish probable cause that the defendants produced or sold child pornography. We also ruled that the operation of a Corrupt Organization for the purpose of selling pornography is not a crime dangerous to life and that, to the extent that the Pennsylvania Corrupt Organization statute authorizes wiretaps for the purpose of uncovering evidence of a corrupt organization promiting the sale of pornography, it exceeds the permissible scope of wiretap legislation permitted by Congress. 18 U.S.C. §2516(2). This court concluded, however, that the crime of Operating a Corrupt Organization for the promotion of prostitution in the middle of the first decade of the AIDS epidemic was clearly dangerous to life.

This is not an expansive interpretation of the Federal Wiretap statute. Congress has specifically permitted wiretapping for

investigating the crimes of gambling, delivery of marijuana, and cigarette bootlegging, 18 U.S.C. §2517. If these enumerated crimes are any indication of Congress' perception of what crimes are sufficiently serious to warrant wiretapping, then clearly the operation of a Corrupt Organization for the purpose of promoting prostitution during a public health crisis is well within the legislative intent of the federal legislation when it provides for wiretapping for crimes dangerous to life.

This court would not have authorized nor does it believe the Superior Court would have authorized wiretapping for the crime of prostitution itself, or for a small prostitution ring. However, the enterprise described in the affidavits is vast. It involved bookstores in Pittsburgh, Murrysville, Yukon and Breezewood all owned by the Birdseyes and bookstores in Moon Township and Beaver Falls for which Mr. Birdseye furnished "dancing girls." The applications requesting continued authorization for the wiretap indicates that the calls were voluminous.

People v. Shapiro

The defendants rely heavily on a case decided by the New York Court of Appeals in 1980, People v. Shapiro, 50 N.Y.2d 747,

409 N.E.2d 897. Shapiro had been convicted of performing various acts of sodomy on eight different high school boys over a seventeen-month period. He was also charged with promoting prostitution as a result of a single incident in which other adults brought young male prostitutes to his home to engage in sexual behavior. His conviction was reversed for three reasons: (1) the court found that the cases were improperly joined; (2) the defendants' due process rights were violated when the prosecuting attorney repeatedly advised his witnesses that testimony on behalf of the defendant would subject them to prosecution for perjury; and (3) the court held that orders authorizing a wiretap of the defendant's phone exceeded the bounds of the United States Code.

The New York Court of Appeals ruled that allegations of sexual abuse and the promotion of prostitution do not come within the "intendment" of the Federal statute because they are not crimes dangerous to life. The court ruled that the words, "dangerous to life," cannot be expanded beyond the contemplation of the drafters to include more subtle forms of personal injury such as the deleterious psychic consequences to minors who participate in such sexual activity. This position drew a strong dissent from two of the court's members.

Once again, however, this case was decided in 1980 and did

not address the actual dangers which anonymous sex poses to life as these dangers were virtually unknown at the time. The Shapiro court simply analyzed the case from the point of view of the individual acts of prostitution between the defendant and his young victims, and the one occasion when he conspired with two other men in this activity. Clearly their lives were not threatened by such activity absent the possibility of a fatally sexually transmitted disease which was not considered in Shapiro. The defendants in the matter before this court relied heavily on the majority opinion in Shapiro. The Commonwealth in its brief cites frequently from the dissenting opinion. However, for the reasons which we have set forth above, this court found that Shapiro is inapposite to the case at bar, as it dealt essentially with the acts of one man and not a vast criminal enterprise promoting anonymous sex for profit in the middle of a health epidemic.

In his opinion in the tax case, Judge Mencer pointed out that the Pennsylvania legislature cannot turn two non-violent crimes of prostitution into a violent crime simply by denominating them a corrupt organization. If that's what the Commonwealth had done here, this court would agree; however, once again, it is clear that the organization described in the affidavits accompanying the wiretap request before our Superior Court described something quite different

than two acts of prostitution. They describe a vast organization covering several counties wherein the defendants profited on the backs of young people engaged in prostitution during a time when anonymous sex was inherently dangerous to their lives. Once again, this argument was apparently not advanced before Judge Mencer in the tax case.

In its brief, the Commonwealth points out that Pennsylvania is not alone in authorizing wiretaps for criminal enterprises organized for the purpose of promoting prostitution. New Hampshire (N.H. Rev. Stat. Ann. 570-A:7), Massachusetts (Mass. Gen. Laws Ann. Ch. 272 §99(B) (7)), Connecticut (Conn. Gen. Stat. Ann. §54-41b), Utah (U. Code Ann. §77-23a-8), Minnesota (Minn. Stat. Ann. §626A.05), Florida (Fl. Stat. Ann. §934.07), and Georgia (Ga. Code Ann. §16-11-64(b) (1)), all have adopted wiretap legislation which would provide for wiretapping for organized criminal enterprises for promoting prostitution. 18 Pa.C.S. §5701. It is obvious, therefore, that many state legislatures have concluded that such a corrupt organization represents a danger to life.

The Commonwealth also advanced the argument that a corrupt organization formed for the purpose of selling pornography is dangerous to life in that it leads to prostitution and other crimes. It cites extensively from the United States Attorney General's task force

on pornography. This court found these arguments unconvincing and concluded that the evidence is not clear that a Corrupt Organization engaged in the sale of pornography is a crime dangerous to life as set forth by Congress in the wiretap act.

The defendants argue that the legislative history of the federal wiretap legislation makes it clear that Congress did not intend to permit wiretapping for crimes such as fornication and adultery, Senate Report, 90th Cong. supra. This court agrees. Obviously, individual acts of adultery and fornication run the same health risk as individual acts of prostitution. The defendants go on to argue that even in the midst of the AIDS crisis, prostitution is no more dangerous than fornication and adultery. There is quite a difference, however, between fornication and adultery on one hand, and prostitution on the other. While fornication and adultery can sometimes be anonymous, they frequently involve sex with a known partner. Moreover, many adulterous relationships and sexual relationships outside of marriage are monogamous and do not pose the same dangers as prostitution. But more importantly, individual acts of prostitution are quite distinct from the calculated operation of a criminal enterprise for the purpose of promoting prostitution on a scale as vast as the Birdseyes' operation.

Conclusion

After Judge Mencer's ruling in the companion tax case was reversed by the Third Circuit, the Superior Court remanded these cases to this court for consideration of the defendants' motion to dismiss. After thorough argument, this court denied the motion. This court concluded that the affidavits were insufficient tc establish probable cause to believe that the defendants were involved in child pornography. Moreover, the court rejected the Commonwealth's expansive theory of prostitution with regard to the use of the video booths which had been altered for anonymous sexual behavior. In agreement with Judge Mencer's opinion, this court also found that the Pennsylvania legislature cannot turn a non-violent crime into a violent crime simply by denominating it a Corrupt Organization.

However, on the basis of arguments apparently not advanced before Judge Mencer, and certainly not considered in his opinion, this court concluded that the alleged criminal enterprise outlined in the affidavits accompanying the Commonwealth's request that the Superior Court authorize wiretaps described a vast organization for the promotion of prostitution in the middle of a decade when a fatal sexually transmitted disease was becoming rampant, and that the crime of using young people to engage in anonymous sex for profit at this

time is not only dangerous but ruthless. When this is done on such a vast scale as to constitute the type of organized crime described in the Commonwealth's affidavits, it becomes a crime clearly dangerous to life and one for which wiretapping is permitted not only by Pennsylvania's wiretap statute but also by the Federal Wiretap Act.

II.

The defendants allege that this court erred in denying their motion to sever.

Rule 1128 of the Pennsylvania Rules of Criminal Procedure provides as follows:

> The court may order separate trials of offenses or defendants or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.

The prejudice which must be considered in determining whether to order separate trials is not simply prejudice in the sense that the defendant will be linked to crimes for which he is not being prosecuted, but is prejudice which would occur if the evidence tends to convict the defendant only by showing his propensity to commit crimes or because the jury is incapable of separating the evidence or cannot avoid cumulating the evidence. Commonwealth v. Lark, 518 Pa. 290, 543, A.2d 491 (1988)

In the present case, defense counsel requested a severance of several of the counts of each of the informations. First, trial counsel requested that the counts charging wiretapping violations be severed. This court denied the request for severance of these counts because the matter of the wiretapping charges was easily separable in the minds of the jury. While it is true that the entire corrupt organizations case would never be presented in a separate trial on the wiretap charges, much of the evidence on the two issues would interface in either trial. Also, the wiretap equipment used by the defendants was used in a business which forms the nexus for all of the charges.

Second, trial counsel requested a severance of the prostitution charges concerning both homosexual and heterosexual prostitution or a severance of the defendants. This court denied this request because the heterosexual prostitution was so easily separable from the homosexual prostitution in terms of its factual basis. Although Mr. Birdseye, Jr. is not charged with heterosexual prostitution, the evidence which was offered in this regard against his father did not tarnish him. It was clear to the jury that Mr. Birdseye, Jr. was not involved in the "bachelor party" operation. Moreover, the verdict slip was drafted in such a way as to obviate any confusion in this regard.

Third, trial counsel requested that the counts charging the defendants with displaying and selling obscene materials be severed.

The court denied this request because, as above, the evidence as to the obscene materials would be easily separable in the minds of the jury. The materials consist of two magazines and a video purchased from one of the defendants' bookstores by a state trooper. These items and the evidence concerning them would not confuse the jury.

In conclusion, despite the fact that multiple trials would be burdensome both to the Court and the Commonwealth, we would not hesitate to order them if we felt that the defendants could not receive fair trials without severance. The court finds that the defendants received a fair trial on all of the charges collectively.

III.

The defendants allege that the court erred in denying their Motion in Limine which requested that the trial testimony be limited to crimes committed in Allegheny County.

The Corrupt Organizations Act of Pennsylvania provides:

> Any act which otherwise would be considered racketeering activity by reason of the application of this clause, shall not be excluded from its application solely because the operative acts took place outside the jurisdiction of this Commonwealth, if such acts would have been in violation of the law of the jurisdiction in which they occurred.

The defendant's Motion in Limine, which was argued at length prior to trial, was granted in part and denied in part. The court explained its decision, and after review, adopts it here:

> Gentlemen, the Motion in Limine is granted in part. I find no basis for this Court's jurisdiction under a general conspiracy theory overall of the acts of, or alleged acts of prostitution based upon the fact that some of the overt acts occurred in Allegheny County.
>
> If there is a hub theory to prostitution, it would seem to me the hub was in Westmoreland County, and Westmoreland County would have jurisdiction over all agreements originating in Westmoreland County regardless of where the overt acts took place.
>
> Prosecution here to my mind must be limited to those agreements or parts of the conspiracy where either the agreement took place in Allegheny County, or the alleged overt act took place in Allegheny County.
>
> The same would be true of the prostitution charges. The Commonwealth has asked leave to reconsider this if the Commonwealth should find law to the contrary over the weekend, and that is granted.
>
> As to the corrupt organization charge, the Motion in Limine is denied for it appears that that statute gives this court the jurisdiction over those alleged acts. One of the bookstores was located in Allegheny County. I don't think it's necessary that all of the stores have to be located in Allegheny County.
>
> (N.T. 5/9/90, pp. 915-196).

IV.

The defendants allege that the court erred in denying their Motion to Dismiss certain counts of the informations based upon the theory of res judicata or collateral estoppel.

Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Ashe v. Swenson, 397 U.S. 436 (1970). A three-step approach is necessary to apply this standard: First, an identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine. Second, an examination of the record of the prior case to decide whether the issue was litigated in that case. Third, an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case. (Citations omitted) Commonwealth v. Hude, 492 Pa. 600, 425 A.2d 313 (1980).

Additionally, under Yudacufski v. Commonwealth of Pa. Dept. of Transportation, 499 Pa. 605, 454 A.2d 923 (1982), a judge should follow the decision of a colleague on the same court when the decision is based on the same set of facts, absent the most compelling

circumstances.

In the present case, a hearing on a defense Motion for Return of Property was held on September 26, 1986, before the Honorable Robert E. Dauer. At the conclusion of that hearing, Judge Dauer returned a token dispensing machine to the defendants. The defendants now take the position that this ruling by Judge Dauer means that as the machine was not an instrument of the crime of prostitution, the defendants were not responsible for any prostitution which occurred on their premises as a result of a patron purchasing a token(s) and then entering a movie booth and engaging in an act of prostitution; and therefore, the Commonwealth is barred by the doctrines of res judicata and collateral estoppel from further prosecution on charges based upon allegations concerning homosexual prostitution. The Commonwealth disagreed with the defense position and we denied the defendants' motion.

After review of the pre-trial argument on this motion, we believe that the court's ruling was correct. The hearing before Judge Dauer was not a full hearing. It was a hearing for the sole purpose of determining whether the machine should be returned to the defendants. Judge Dauer neither considered nor disposed of the issue regarding homosexual prostitution. Moreover, the proceeding before Judge Dauer was in rem, whereas the proceeding before us was in

personam. Accordingly, we believe the denial of the motion on these grounds was proper.

V.

The defendants allege that the court erred in denying portions of their Motion for Discovery.

The defendant's right to discover materials in the possession of the Commonwealth is governed by Pa.R.Crim.P. 305. Subsection B(1)(a) of that rule requires that the requested evidence be exculpatory material and in the possession or control of the District Attorney.

In this case, the defense requested discovery of numerous items, including police reports, tapes and transcripts. The vast majority of items requested by the defense were produced by the Commonwealth; however, the defense request that the Commonwealth produce mental health reports of its witnesses was denied for the following reasons: First, defense counsel was merely on a "fishing expedition." Counsel was unable to provide the court with any concrete evidence that these reports even existed. Second, the defense was unable to show the court in what manner these items would be exculpatory to the defense. They were not reports of examinations conducted upon the defendants nor upon the "victim" in

this case, since the Commonwealth, and not one specific person, was actually the victim in this case. Third, the defense did not establish that these reports were material in that it did not show that the reports would tend to prove or disprove any important fact at trial. Fourth, the defense did not prove that these reports were in the possession or control of the District Attorney. The fact that these reports, if they existed, may have been in the possession of another government agency does not mean that the District Attorney, who is an entirely separate government agency, has possession, control, or even access to them.

VI.

The defendants allege that the court erred in denying their Motion to Produce the Confidential Informants.

> [A] defendant seeking production of a confidential informant at a suppression hearing must show that production is material to his defense, reasonable, and in the interest of justice. By this we mean that the defendant must demonstrate some good faith basis in fact to believe that a police officer-affiant willfully has included misstatements of facts in an affidavit of probable cause which misrepresents either the existence of the informant or the information conveyed by the informant; that without the informant's information there would not have been probable cause; and that production of the informant is the only way in which the defendant can substantiate his claim.... After such showing is made it shall be within the

> discretion of the court as to whether or not to order the production of the informant. Commonwealth v. Bonasorte, 337 Pa. Super. 332, 486 A.2d 1361, 1373-1374 (1984).

Further, in Commonwealth v. Miller, 513 Pa. 118, 518 A.2d 1187 (1986), our Supreme Court held that the Commonwealth does not have to disclose the identity of an informant where it is established that the disclosure of such information would jeopardize the safety of the non-governmental informant.

The defendants requested that the court order the Commonwealth to disclose the identity of the three sources listed in the wiretap and search warrant affidavits as Source One, Source Two, and Source Three. The court declined to order the Commonwealth to do so formally; however, it was apparent throughout the pre-trial and trial proceedings that the defense was confident that it knew the identity of each of these informants in any event.

The primary reason for denying the defense request that the informants be specifically named by the Commonwealth was State Trooper Gentile's testimony regarding the informants' fears for their safety. Trooper Gentile stated that the informants were afraid of physical retaliation from the defendants (N.T. 5/1/90, pp. 114-118). This was also apparent from the testimony of the husband of Marie Romanell (whom the defense believed to be one of the informants), who was reluctant to reveal his wife's whereabouts because she and

their children had been threatened (N.T. 5/1/90, p. 104).

After reviewing the applicable case law in light of the previous ruling, we believe that the ruling was correct. Although the defense made certain allegations with regard to the veracity of the affiant, these allegations were not convincing. The convincing testimony was that of Trooper Gentile and Mr. Romanell, both of whom expressed legitimate concerns for the safety of the informants. This type of concern is well recognized in the criminal justice system. Without the aid of informants, numerous crimes would remain undetected. With the aid of informants, the government is able to prosecute many serious offenses. The peril for the informants is that their identify will be revealed to those who are accused based upon the informants' information and the accused will retaliate by harming the informants or their families. In a proceeding outside the hearing of the jury, Mr. Birdseye, Jr. corroborated the testimony of prosecution witnesses that he told them that he knew where the child of one of the witnesses attended school. He testified, however, that he was only joking (N.T. 5/1/90, pp. 171-178). The court was not willing to risk that possibility in this case because the defense was unable to sufficiently establish the falsity of the information contained in the affidavits.

Finally, and most important, at the request of the defense, the court ordered the Commonwealth to produce the persons whom the

defense believed were Confidential Informants One and Two. These witnesses, Marie Romanell and Gina Rizzo, were thoroughly examined under oath by the defense. Trooper Gentile testified that he did not recall the identify of Confidential Informant Three. He had met her only one time and the information she provided was merely corroborative. It would not have, and did not provide, probable cause for the affidavit.

Even though the Commonwealth was directed to produce Marie Romanell and Gina Rizzo for examination, the court refused the request of the defense to force Trooper Gentile to identify them as Confidential Informants One and Two. The Commonwealth strenuously opposed the court's orders to produce the two witnesses for examination but reluctantly complied. This compromise was fair given the credible testimony regarding fear of retaliation. For these reasons, the court's denial of the request to produce the informants was proper.

VII.

The defendants allege that the court erred by denying their request that the Commonwealth file a detailed Bill of Particulars.

The purpose of a bill of particulars is to give notice to the

accused of the offenses charged in the bill of indictment so that he may prepare a defense, avoid surprise, or intelligently raise pleas of double jeopardy and the bar of the statute of limitations. Commonwealth v. Mervin, 230 Pa. Super. 552, 326 A.2d 602 (1974). A bill of particulars is not designed to perform the function of a discovery device and the Commonwealth's evidence is not a proper subject to which a petition for a bill of particulars may be directed. Commonwealth v. Bartman, 240 Pa. Super. 495, 367 A.2d 1121 (1976).

Prior to trial, at the request of defense, the court ordered the Commonwealth to file a Bill of Particulars. The Commonwealth complied with this Order and filed a detailed Bill of Particulars. However, the defendants were not satisfied and they requested a more detailed Bill, setting forth with specificity what each of the defendants did that constituted a crime and the names and addresses of "each and every actor in and witness to" the alleged acts of prostitution. The court denied this request.

After reviewing the Bill of Particulars filed by the Commonwealth in light of the case law, the court finds that its denial was proper. The additional specificity requested was unnecessary for the purpose of preparing a defense in this matter. In fact, the defendants presented a very lengthy, well-researched and fully

prepared defense which convinces us beyond any doubt that they were quite aware of the exact nature of the charges filed by the Commonwealth. Additionally, the case law is clear that the Bill of Particulars is not to be used to allow the defense to rummage through the Commonwealth's files.

VIII.

The defendants allege that the court erred in denying their request for a writ of habeas corpus ad testificandum for Robert Hupchuck, a prison inmate.

The Pennsylvania Constitution, Article I, Section 9, guarantees an accused the right to have compulsory process for obtaining witnesses in his favor. This constitutional right is not, however, absolute. Commonwealth v. Jackson, 427 Pa. 237, 324 A.2d 350 (1974). That is, if the testimony of certain witnesses would not be admissible at trial, the Constitution does not require that a defendant be given the right to secure the attendance of witnesses which he has no right to use. Id. Further, the defendant must establish that the person to be produced has relevant testimony on the issues in question. Commonwealth v. Coffey, 230 Pa. Super. 49, 331 A.2d 829 (1974).

After the parties had rested, the defense filed a Petition for Writ of Habeas Corpus Ad Testificandum. In the petition, the defense requested that Robert Hupchuck, an inmate at the State Correctional Facility at Mercer be transported to the Allegheny County courthouse to testify as to the contents of a letter that he sent to defense counsel. In that letter, Mr. Hupchuck made allegations that Trooper Louis Gentile promised to forgive Mr. Hupchuck's transgressions if Mr. Hupchuck would plant "kiddie porn" in the defendants' stores. After an examination of the matter on the record, the court denied the defendants' request (N.T. 6/8/90, pp. 2494-2505).

After reviewing the case law and the arguments of counsel, the court finds that its denial of the defendants' motion of a Writ of Habeas Corpus Ad Testificandum was proper for the following reasons:

First, at the time that this petition was presented to the court, the parties had rested and were preparing to close to the jury. Second, if the court had found the allegations to be relevant and material, it could have re-opened the case, but after review, it found them to be collateral to the issues at trial. Third, the events about which Mr. Hupchuck wrote to defense counsel are alleged to have occurred some two years after the events which gave rise to the charges against the defendants. Fourth, if the court were to have re-opened the case, the

Commonwealth would no doubt have been required to call witnesses in rebuttal. That, in effect, would lead to a trial within a trial which is exactly what the collateral matter doctrine intends to obviate. Fifth, the letter involves allegations regarding child pornography. All of the allegations of child pornography proved to be groundless and no such charges were filed against the defendants. Finally, the allegations in the letter are somewhat equivocal.

IX.

The defendants allege that the court should have sanctioned the police witnesses for destroying their notes, including the identity of Source Three.

Rule 305 of the Pennsylvania Rules of Procedure sets forth the requirements for discovery in a criminal case. The Rule requires that the Commonwealth provide to the defendant, inter alia, all evidence favorable to the defense, all confessions of the defendant, results of an identification procedure, reports of scientific tests and experts, and tangible objects. A review of the case law reveals no holding that requires police officers to save their notes from investigations for purposes of providing them to defense counsel pursuant to a discovery request.

During the defense, the court ordered the Commonwealth to produce the person known as "Source Three" in the affidavit for the wiretap. Gina Rizzo testified that she forgot the person's name because she was only a passing acquaintance (N.T. 6/8/90, pp. 2035-2036). Trooper Louis Gentile also stated that his meeting with Source Three was "innocuous" and she had not developed any prior reliability (N.T. 6/8/90, pp. 2369-2371).

Based upon the testimony of Ms. Rizzo and Trooper Gentile, defense counsel requested a dismissal of certain charges or, in the alternative, a missing witness jury instruction. After a discussion with counsel, the court denied both of these requests for the following reasons. First, although we ordered the Commonwealth to produce the witness, it was unable to do so. Nemo dabet quod non habet -- nobody can give what he does not have. Second, the witness's testimony would have been corroborative and cumulative. Mr. Birdseye, Sr. and Ms. Rizzo testified as to the content of the conversation that this witness overheard; thus, her testimony would be merely cumulative. Third, a missing witness charge would be inappropriate because the Commonwealth does not have control over this witness and, in fact, according to the testimony of its witnesses, does not even know the person's name. Source Three, as an untested informant, added little or nothing to the affidavit of probable cause.

X.

The defendants allege that the court erred in permitting the Commonwealth to use hearsay testimony.

"It is hornbook law that testimony by a third person as to extra-judicial utterances made by another, when offered to prove the truth of the matter averred therein, constitutes hearsay evidence and is inadmissible at trial because the competency and veracity of the original speaker are not subject to examination." Commonwealth v. Perry, 279 Pa. Super. 32, 420 A.2d 729, 732 (1980).

During the testimony of Commonwealth witness, George Troianos, a former manager at one of the defendants' bookstores, the witness stated, "I never actually saw money change hands, but a lot of the night people that came in there, I think, made their living through them." (N.T. 5/25/90, pp. 1431). Defense counsel objected and moved for a mistrial. A hearing was held outside the presence of the jury to develop how the witness knew this information. After the hearing, the request for a mistrial was denied, and the jurors were instructed that they were to disregard the witness's opinion; additionally, the court permitted the Commonwealth to develop the witness's observations. (N.T. 5/25/90, pp. 1431-1442).

After reviewing the transcript, the court believes that its ruling

was correct for the following reasons. First, the Commonwealth's case in this regard was circumstantial and the facts to be developed by the prosecutor were all pieces of circumstantial evidence. Second, we feel that our caution to the jury to disregard the witness's opinion cured any prejudice suffered by the defendants. Third, the Commonwealth intended to and later did offer testimony from male prostitutes who engaged in their trade inside the bookstores.

XI.

The defendants allege that the court erred in allowing the Commonwealth to introduce evidence of uncharged misconduct.

Evidence of distinct crimes is not admissible against a defendant being prosecuted for another crime solely to show his bad character and propensity for committing criminal acts. Commonwealth v. Lark, 518 Pa. 290, 54 A.2d 491 (1988). Further, relevant evidence is that which, either taken alone or in connection with other evidence, tends to prove or disprove some material issue in the case. Commonwealth v. Wax, 391 Pa. Super. 314, 571 A.2d 386 (1990). Stated another way, to establish relevancy we ask whether evidence sheds light upon or advances the inquiry in which the fact-finder is involved. Id. If the evidence in question is logically relevant

it is admissible unless the trial court, in its discretion, determines that its potential prejudicial impact outweighs its probative value. Id.

In the present case, the defendants complain that we should have prohibited the Commonwealth's witnesses from referring to "other crimes" and "other distasteful acts." Specifically, the defendants claim that the following references should have been excluded: certain persons being able "to tolerate blacks," the teasing of a homosexual, discussions about "Edna May" wanting a sex change operation, testimony that one of the defendants carried a firearm, and incidents of sexual conduct which occurred outside of Allegheny County.

After reviewing the trial testimony, we believe that all of these references were relevant to the inquiry at hand. Most of the references in question were contained in one of the numerous recorded conversations played for the jury. These conversations were essential to the Commonwealth's proof of the charged crimes in that they established prostitution which occurred after the bachelor parties. Also, the references were, in actuality, a very small portion of a three-week trial in which both sides called numerous witnesses to testify. As the references were relevant in establishing the crimes charged and they were not highly prejudicial to the defense, we are unable to find any error in admitting them into evidence.

XII.

The defendants allege that we erred in limiting their proof of community standards by limiting their comparable items to "a few magazines and only one hour of video tape."

In Hamling v. United States, 418 U.S. 87 (1974), the United States Supreme Court rejected the argument that "availability" of comparable materials demonstrates community acceptance under the "patent offensiveness" prong of the obscenity test. The Court stated:

> [T] he availability of similar material on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating ... [T]he mere fact that materials similar to the brochure at issue here are for sale and purchased at bookstores around the country does not make them witnesses of virtue... Mere availability of similar material by itself means nothing more than the other persons are engaged in similar activities. 418 U.S. at 125-126.

Also, our Superior Court, in the nationally recognized case of Long v. 130 Market St. Gift and Novelty, Etc., 294 Pa. Super. 383, 440 A.2d 517 (1982), held

> ... The contemporary community standard element, necessary to establish the obscenity or lack of obscenity of published material is not concerned with the availability of the material, but rather with its acceptability. The fact that one can walk into an "adult book store" in some of the towns and cities of the Commonwealth and purchase a film or publication devoted on the whole, to bestiality, sado-masochism,

> or any of a number of other often questioned sexual predilections, by no means implies that the average Pennsylvanian would not find the subject matter appealing to prurient interests. The statewide availability of sexually explicit films and publications does not bespeak their acceptability.

In this case, after a lengthy discussion, we ruled that the defendants were entitled to present evidence of community standards. We further ruled that to do so, evidence of films of general distribution would be relevant. The defense proposed to put together a video which would be a composite of several films and/or videos available to the public. At the suggestion of defense counsel, we limited the length of their composite-video presentation to one hour. Additionally, the defendants indicated that they wished to introduce "some magazines and printed materials that are generally available" and the testimony of Chancy Rawleigh (a college professor, sex therapist, and minister). Over the objection of the Commonwealth, we permitted the defense to introduce all of the items and the expert testimony of Dr. Rawleigh (N.T. 5/9/90, pp. 1183-1197, 2378-2379).

After reviewing the transcripts and calling on our own recollections of the defense video and magazines, we are convinced that the defense was given a more than adequate opportunity to present evidence of community standards. The defense presented a one-hour

video tape, which consisted of portions of three sexually-explicit movies; and it introduced into evidence seven sexually explicit magazines. This was fifteen more minutes of video and six more magazines than the Commonv ealth presented. Also, the testimony of Dr. Rawleigh was complete, including his opinions as to whether the magazines and videos were within the norm of contemporary community standards in Pennsylvania. To have allowed the defense to present a longer video and/or more magazines may have turned the courtroom into a circus.

XIII.

The defendants allege that the court erred in making a particular comment to the jury.

Every unwise or irrelevant remark made in the course of a trial by a judge does not compel the granting of a new trial. Commonwealth v. Williams, 468 Pa. 45, 364 A.2d 281 (1976). A new trial is required when the remark is prejudicial (i.e., when it is of such a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial). Id.; Commonwealth v. Rhodes, 272 Pa. Super. 546, 416 A.2d 1031 (1979).

One of the allegations against the defendants was that they sold a video tape named "Breeders" and that this tape was obscene pursuant to 18 Pa. C.S. §5903(a)(2). As part of its case, the Commonwealth played the sexually explicit video for the jury and the court in order that the jury could make a determination as to whether or not the tape was obscene. Among other things, the video included explicitly nude scenes of coitus, fellatio and the chaining and beating of a nude man and woman. The playing of such a piece in open court creates a rather tense atmosphere. After the video had been played, the court commented, "On that high note, we are going to call it a day." (N.T. 5/25/90, p. 1631).

This remark was not meant to be a comment on the nature of the evidence nor to prejudice the defendants at all. It was simply an attempt to ease a rather tense courtroom. It was made in an offhand manner and certainly does not suggest a verdict. Given the fact that this trial lasted several weeks, it is beyond the realm of possibility that such a comment could have affected the verdict.

XIV.

The defendants allege that the court erred by stating to one of the numerous panels of jurors that Mr. Birdseye, Sr. had been charged with Criminal Conspiracy.

A prejudicial remark has been defined as one which is of such a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial. Commonwealth v. Rhodes, 272 Pa. Super. 546, 416 A.2d 1031 (1979).

Although the court was unable to find any reference in the record concerning this issue, its recollection is as follows: During the court's address to the first panel of thirty-five prospective jurors, it read the defendants' charges to them. Although a charge of Criminal Conspiracy against Mr. Birdseye, Sr. had been severed, the court inadvertently read that charge to the prospective jurors. The court immediately corrected the error by telling the panel that the defendant was not so charged.

This remark to the panel of prospective jurors was not prejudicial to the defendants for the following reasons: First, the remark was inadvertent and was corrected immediately. Second. the remark was made to a panel from which only one or two actual jurors

was selected. Third, there was absolutely no intention on the court's part to taint the potential jurors. It is impossible that the mere mention of the word "conspiracy" to one of several panels of potential jurors could have prejudiced the defendant in a trial lasting several weeks.

XV.

The defendants allege that the court erred in instructing the jury in two particulars.

"The primary duty of a trial judge in charging a jury is to clarify the issues so that the jury may understand the questions to be resolved." Commonwealth v. Litman, 276 Pa. Super. 114, 419 A.2d 121, 123 (1980). Also, the trial court "is free to use its own form of expression so long as it adequately, accurately, and clearly explains the principle of law for the jury." Commonwealth v. Whitnes, 278 Pa. Super. 175, 420 A.2d 486, 490 (1980).

The defendants' assignments of error concern the court's instructions to the jury regarding the obscene materials. First, the defendants object to the instruction that the jury may find all of the materials shown to them to be obscene. Second, the defendants object to the court's failure to instruct the jury that the obscene materials had to be used to conduct the enterprises, rather than merely being

incidental to its operation.

A review of the very lengthy charge to the jury indicates that it was complete and that it clearly explained the applicable law to the jury. The court used the standard instruction defining "obscene materials." Because the court went beyond what is required by the case law and permitted the defendants to present the magazines and a composite video as evidence of community standards, it was required to give the jury some instruction as to the purpose of the evidence submitted by the defendants. First, the court made it very clear to the jury that the defendants were on trial for distributing only the one video and two magazines presented by the prosecution. This was repeatedly stated and restated to the jury and the verdict slip made it clear that their verdict related to only the two magazines and one video submitted by the prosecution.

Second, the court instructed the jury that the magazines and composite video presented by the defendants were evidence of community standards. The court instructed the jury that they were not to decide whether the materials presented by the defendants were "worse" than those presented by the prosecution. Rather, the jury was told that it might find that applying contemporary standards that none of the material was obscene. Or, it might find that some of the material was obscene, or that it might find that all of the material was

obscene and other material was not obscene. The court made it very clear to the jurors, however, that their responsibility was not simply to compare the material and judge which was worse; rather, it instructed them to consider the video and magazines submitted by the defendants as evidence of community standards together with the other evidence in the trial. Having done so and applying their own judgment concerning the current community standards in Pennsylvania, they were to determine only whether the two magazines and single video presented by the prosecution were, in fact, obscene. Once again, we arranged the verdict slip in such a way that the jury was guided in this regard as the various counts alluded to the specific magazines or video presented. As the verdict slip required that the jury make specific findings with regard to each of the two magazines and the video, there is absolutely no possibility that the jury could have convicted the defendants on the basis of the material which they themselves submitted as evidence of community standards.

We were somewhat surprised by this assignment of error. During its deliberations, the jury requested reinstruction on obscenity. We repeated the standard instructions. Defense counsel, at sidebar, specifically requested that we repeat the instruction of which he now complains. (N.T. 6/8/90, pp. 2786-2788).

Finally, the defendants allege that the court failed to instruct

the jury that the obscene materials had to be used to conduct the enterprises. The court's charge followed the standard instruction and accurately explained the law. Section 911 (b)(3) of the Corrupt Organizations statute provides that:

> It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity. 18 P.S. 911 (b)(3).

The court instructed the jury as follows:

> In order to find either or both of the defendants guilty of the crime of corrupt organizations, you must be satisfied that the following two elements have been proven beyond a reasonable doubt. First, that either or both of the defendants associated with a certain enterprise, in this case, a chain of adult bookstores; and second, that either or both of the defendants conducted or participated directly or indirectly in the conduct of the affairs of that chain of adult bookstores through a pattern of racketeering activity. (N.T. 6/8/90, p. 2748).

The court then went on to define racketeering activity. This instruction follows the standard instruction and clearly sets forth the elements of the crime of Corrupt Organizations.

XVI.

The defendants allege that the evidence proffered by the Commonwealth was insufficient to sustain their convictions.

The test for sufficiency of the evidence is whether the evidence admitted at trial is sufficient to prove every element of the crime charged beyond a reasonable doubt. Commonwealth v. Davis, 491 Pa. 363, 421 A.2d 179 (1980). In this regard, the evidence must be viewed in the light most favorable to the party in whose favor the verdict was returned, and all reasonable inferences must be accepted as true. Commonwealth v. Burton, 450 Pa. 532, 301 A.2d 599 (1973). Further, the Commonwealth does not have to establish guilt to a mathematical certainty and it is sufficient if the circumstances are consistent with innocent behavior. Commonwealth v. Herman, 227 Pa. Super. 326, 323 A.2d 228 (1974).

Regarding the conviction for Corrupt Organizations, the defendants allege that the Commonwealth's evidence did not show a pattern of racketeering activities. On the contrary, the Commonwealth, which is required to prove at least two acts of racketeering activity, proved beyond a reasonable doubt that all of the following activities were occurring with the knowledge and consent of the defendants and either within or connected to the defendants' adult

bookstores: the performance of sexual favors for patrons of stag parties by dancers employed by the defendants, the sale of obscene materials (both printed and video), and the condoning and encouraging of the use of the video booths for prostitution. The evidence of these activities came from a wide variety of witnesses and numerous audio tapes. Specifically, police officers testified about hiring two of the defendants' dancers to dance and perform acts of prostitution; a state trooper testified as to his purchase of the magazine "Tortured Ladies" (Commonwealth Exhibit 3), and a video titled "Breeders" (Commonwealth Exhibit 4); numerous audio tapes of conversations between Mr. Birdseye, Sr. and other persons wherein arrangements for acts of prostitution are discussed; a carpenter testified that he was directed by Mr. Birdseye, Jr. to cut holes in the wood which divided the video booths in the defendants' bookstores; the testimony of three women who worked as dancers for the defendants; the testimony of a former store manager of one of the defendants' bookstores; and the testimony of prostitutes who indicated that they used the video booths for prostitution. Accordingly, we believe that the crime of Corrupt Organizations was proven beyond a reasonable doubt.

Regarding the conviction for distribution of Obscene Materials, the defendants allege that the Commonwealth's evidence

did not establish that the defendants were aware that the items were for sale in one of their bookstores and that the Commonwealth failed to offer any evidence as to the "contemporary community standards." As for the defendants' initial claim, the Commonwealth showed definitively that the defendants were aware of the presence of both the magazine and the video in their store. Carol Halterman, the former bookkeeper/office worker for the defendants, testified that Mr. Birdseye, Jr. paid the bills, accepted the UPS deliveries, and generally took care of the store inventory. (N.T. 5/25/90, pp. 1321-1323). Also, George Troianos, a former store manager who worked for the defendants for six years, stated that Mr. Birdseye, Jr. did the ordering of stock for the stores (N.T. 5/25/90, p. 1415). This type of evidence, despite the defendant's denials, proves that they were well aware of the existence of the materials.

As to the defendants' second claim in this regard, it was not necessary for the Commonwealth to offer direct evidence on the "contemporary community standard;" rather, it was up to the jury to apply the contemporary community standard as they judged it to be based on their own experience.

> Now, as both attorneys indicated to you in their closings, you are charged with making a judgment with regard to only two of the items that have been presented to you during the trial, the magazine, Tortured Ladies, and the video, Breeders. But as you know, the defense has presented to you other

magazines and has shown a composite of other videos. The defense has presented these to you in an effort to prove to you what the community standards are.

The purpose of this evidence, as well as the testimony of Doctor Rawleigh, is to help you determine what community standards in Pennsylvania are or were in 1986 by demonstrating what is generally accepted in the statewide community at locations not specializing in adult materials.

In deciding what community standards were in Pennsylvania in 1986, you must decide what conclusion the average person applying contemporary standards would reach in these respects, and in doing so, you are entitled to draw on your own knowledge the views, the sense of the average person in the community of Pennsylvania from which you came.

(N.T. 6/8/90, pp. 2745-2746)

Regarding the conviction for Wiretapping, the defendants allege that the Commonwealth's evidence did not establish that the defendants' employees had an expectation of privacy. The statute does not require that the Commonwealth prove the existence of an expectation of privacy; it requires only that the Commonwealth prove a willful interception of an oral communication. Accordingly, the crime of unlawful wiretapping was proven beyond a reasonable doubt.

XVII.

The defendants allege that we abused our discretion in imposing sentence on them.

The imposition of sentence is within the sound discretion of the sentencing judge. Commonwealth v. Jackson, 336 Pa. Super. 609, 486 A.2d 431 (1984). Further, a sentence must either exceed the statutory limits or be manifestly excessive to constitute an abuse of discretion. Commonwealth v. White, 341 Pa. Super. 261, 491 A.2d 252 (1985). "A sentencing judge's discretion must be accorded great weight as he is in the best position to weigh various factors such as the nature of the crime, the defendant's character, and the defendant's displays of remorse, defiance, or indifference." Commonwealth v. Fries, 362 Pa. Super. 163, 523 A.2d 1134 (1987).

The sentencing hearing in these matters was conducted on March 4, 1991. Pre-sentence reports were prepared for each defendant and were reviewed by the parties and the court prior to the hearing. First, the Commonwealth requested restitution in the amount of $23,695.74 for the costs of prosecution. The court denied this request without prejudice because the defendants had not been given proper notice of the Commonwealth's request. Second, the District Attorney addressed the court, highlighting the vast nature of the

defendants' enterprise. The defense attorney, in his argument, countered that the offenses were relatively minor. Each defendant was informed of his right to allocution and each declined.

Because the allegations arise from events alleged to have occurred between 1985 and 1987, the guidelines were not binding. However, the court considered them for guidance in sentencing. The crime of Corrupt Organizations is the most serious crime of which the defendants were convicted and carries an offense gravity score of "seven" and they have a prior record score of "zero." The ranges are as follows:

Mitigated Range	Standard Range	Aggravated Range
4 to 8 months	8 to 12 months	12 to 18 months

The court also considered Section 303.1 of the guidelines:

> The Commission recognizes the difficulties in setting sentences in certain cases. These include, but are not limited to.....white-collar crime; [and] organized crime...These crimes may warrant a sentence more severe than otherwise suggested in this chapter. 204 Pa.Code 303.1.

The court then went on to discuss the enormity of the defendants' operations:

> Now, Mr. Crawford points out quite correctly that these Defendants are not members of the Mafia, have not engaged in violence and force to perpetuate

> economic crime, and that is true. But I just studied Section 911 of our Criminal Code, and it is clear to me that it is the judgment of the legislature that the activity in which they were involved is in fact organized crime.
>
> Our law has always treated prostitution fairly benignly, I think, recognizing basically that people are going to do what they're going to do. And, in fact, the act of prostitution is simply a misdemeanor under the laws of the Commonwealth.
>
> The law also recognizes that when you engage in organized activity in a pattern of racketeering activity as defined by the statute, what may be otherwise benign, such as placing a bet on the numbers or on a sports event, becomes much more serious. The venial becomes felonious.
>
> (N.T. 3/4/91, pp. 16-17)

The court then went on to discuss the fact that the defendants conducted this enterprise at a time when our country was experiencing a health crisis brought on by a sexually transmitted virus causing a disease that is generally fatal and at the time of sentencing, still incurable:

> In this case, each of the Defendants has been convicted of a serious felony, a felony of the first degree carrying a maximum period of incarceration of twenty years. As part of our pretrial findings, and I think one of the most significant legal issues in the case, we found that Pennsylvania's wiretap statute did not violate the Federal Wiretap Act because organized prostitution was, in 1986, and is today, a crime dangerous to life. And we think that fact is self-evident.
>
> I'm not sure that the record shows in this case that the Defendants ever did anything that endangered the lives of any particular person, but they did engaged in [that] behavior to varying degrees, I believe.

I think the culpabilities of the Defendants differ in this matter, the culpability of the Defendants differs, they did engage in activity which placed people at risk, particularly Mr. Birdseye, Senior in the so-called dancing girl operation. It was, of course, his contention that it was nothing but bachelor parties, and it was the contention of the Commonwealth that it was nothing but a sham for organized prostitution.

I listened to the tapes of Mr. Birdseye's conversations with those young women, I've listened to them many times during the course of pretrial and the trial, and I heard these young women testify from the stand. It was obvious to me that they were very desperate individuals in desperate financial straits for whatever reasons, I do not know.

Mr. Birdseye, Senior preyed on their desperation for profit. He must have recognized that there was a risk to the health of these women in engaging in anonymous sex, and at least some risk to their lives.

Both Mr. Birdseye, Senior and Mr. Birdseye, Jr. were convicted of promoting homosexual prostitution by permitting their facilities to be notoriously used for prostitution by male prostitutes. In the conversations of Mr. Birdseye, Jr., particularly, it was obvious to me that the facilities were being prepared and unprepared, modified and re-modified in order to facilitate sexual contact, anonymous sexual contact, within those facilities. The holes can serve no other purpose.

That activity also promoted or caused a danger to health, and may have in some cases caused a risk to life.

There were two theories as to that crime, one, the Defense theory that they simply had these adult stores, that the people who patronized the stores were going to do what they were going to do. I suppose there's some value to that theory, but the Commonwealth's theory -- apparently the theory that the jury believed and found -- was that based on the witnesses and the

testimony and the tapes, modification and re-modification of the facilities, that it was obvious that prostitution was occurring as well as consensual adult sex that was not involved in prostitution, and that the Defendants must have recognized once again there was some danger to health, and sexual contact involves at least a risk of sexually transmitted diseases, and that at the time of these offenses at least one of those diseases was potentially fatal.

(N.T. 3/4/91, pp. 17-20)

Accordingly, the court sentenced Mr. Birdseye, Jr. as follows:

For the reasons that we have stated of record, at the count of corrupt organizations, a felony of the first degree, it is the judgment of this Court that you be sentenced to a period of incarceration in the state prison system of not less than three years nor more than twenty years. And that you be fined $25,000. We enter no further penalty at the remaining counts.

(N.T. 3/4/91, p. 21)

The court then imposed the following sentence on Mr. Birdseye, Sr.:

I believe that the dancing girl operation was perhaps the most dangerous of the crimes committed. Your son is not criminally responsible for that part of the operation, and I believe you deserve a more severe sentence than your son for preying on the desperation of those young women.

It is the judgment of this Court that at the count of corrupt organizations, a felony of the first degree, you be sentenced to a sentence of no less than five nor more than twenty years, that you be fined $25,000, and I enter no further penalty at the remaining counts.

(N.T. 3/4/91, pp. 21-22)

At some point on the record, the court indicated that the minimum sentences (the time the defendants may actually spend in jail) were at the low to medium range of sentences it had handed down in organized crime cases. The purpose of the lengthy parole periods (the maximums) was to see that the defendants acted within the law after release from prison. After hearing many weeks of testimony, the court became convinced that the defendants have little regard for the law and for the well being of their fellow citizens.

The court is well aware that in matters sexual, people are going to do what they're going to do. Prostitution is often called the oldest crime on the books and is treated fairly benignly by the law. The defendants, however, are not mere prostitutes scratching to eke out a living. They are cold, calculating businessmen making a buck on the backs of desperate young women and men at a time when such activity exposes them to serious risks to their health and possibly even death. Their operation was vast, their disposition uncaring, their punishment appropriate.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, and JAMES L. SHERLOCK, Special Agent of the Internal Revenue Service,	)	
Petitioners,	)	
v.	)	Civil Action No. 87-2406
MILLSTONE ENTERPRISES, INC., R & R TRUCKING AND TRANSPORTATION, INC., VEE'S BOOK BOUTIQUE, INC., TRUCKERS TRAINING AND TRANSFER, INC., BUSINESSMAN'S MANAGEMENT AND CONSULTING COMPANY, INC., BOULEVARD BOOKSTORE, INC.,	)	
Respondents.	)	

MEMORANDUM OPINION

Procedural Background

This is an action by the United States of America and a Special Agent of the Internal Revenue Service's [IRS] Criminal Investigation Division, James L. Sherlock [collectively "the Government"] to enforce a summons issued to the respondents. The respondents are six corporations controlled by William Robert Birdseye. Birdseye is

currently being prosecuted, along with his son William Richard Birdseye, by Allegheny County, Pennsylvania, authorities on criminal charges related to prostitution and pornography.

Special Agent Sherlock is conducting a IRS criminal investigation to determine whether William Robert Birdseye committed criminal offenses with regard to his income taxes for the years 1982 to 1985. On March 20, 1987, Sherlock issued a summons seeking production of the corporate books and records of the six corporations who are the respondents in this action. The summons also directed Birdseye, as president of the respondent corporations, to answer questions put to him by Sherlock. William Robert Birdseye and the respondents have refused to comply with the summons, claiming that the criminal tax investigation, the summons and Special Agent Sherlock's questions for Birdseye are derived from an illegal wiretap. This court held a hearing at which the respondents were to show cause why they should not comply with the IRS summons. We issued an order on January 7, 1988 directing the respondents to comply with the summons. When the respondents maintained their refusal to comply with the summons, this Court held a civil contempt hearing on April 5-6, 1988. We must now decide whether the respondents should be held in contempt of this court's order, or whether they had "just cause" to refuse compliance.

Facts

On April 21, 1986, Pennsylvania Superior Court Judge Zoran Popovich authorized the Pennsylvania State Police and Westmoreland County law enforcement officials to wiretap three Birdseye telephones. Pen register devices had already been monitoring these telephones, authorized by a Pennsylvania Court of Common Pleas Judge in January 31, 1986. Pennsylvania /Superior Court Judge Zoran Popovich's April 21, 1986 wiretap authorization was founded on a finding of probable cause that William Robert Birdseye was violating: Title 18 Pa. C.S. § 5902 (engaging in prostitution and related offenses); Title 18 Pa. C.S. § 911 (Corrupt Organizations statute, engaging in a pattern of racketeering activity within the meaning and purview of the statute), and; Title 18 Pa. C.S. § 903 (conspiracy to violate the preceding sections).

Evidence acquired through wiretapping formed the basis of probable cause for search warrants for a series of raids on the Birdseye residence and businesses conducted by state and local enforcement officials beginning in May, 1986 and ending July 18, 1986. An IRS Special Agent, Robert R. Clark, took part in the July 18, 1986 raid of the Birdseye residence, at which the authorities

examined and seized financial records, a computer and computer discs.

The IRS's criminal tax investigation of William Robert Birdseye was officially begun by Special Agent Sherlock nearly three months later, when a case number was assigned on October 10, 1986. Special Agent Sherlock testified that a case is "numbered" when the IRS has an indication that there has been a violation of a tax law. Sherlock's initial involvement in the Birdseye investigation was when he was invited by Westmoreland County law enforcement officials to review documents that had been seized in the raids on the respondent corporations' premises and the Birdseye residence. Sherlock testified that in late July or early August, 1986, he visited a Pennsylvania State Police barracks where he reviewed most, but not all, of the material seized by the state and local authorities. He photocopied certain of the seized records at that time. Sherlock requested copies of William Robert Birdseye's personal income tax returns from the IRS files on August 8, 1986. He did not request tax returns for the respondent corporations until some later date.

While the IRS did not begin its case investigating William Robert Birdseye until October 10, 1986, several IRS Criminal Division agents had previously acquired isolated snippets of information on Birdseye. Special Agent Sherlock testified that prior to

November, 1985, IRS Criminal Division Agents Gary McCoffskey and James Blum learned, through a different investigation, that Birdseye allegedly had supplied go-go girls to a bar. In November, 1985, Westmoreland County detectives informed Agent Blum that Birdseye was alleged to be involved in prostitution. Blum filed a report on this information, bur made no mention of possible tax violations. He did not request copies of Mr. Birdseye's tax returns, and did not initiate a criminal tax investigation.

In late December, 1985 or early January, 1986, IRS Agent Robert Clark was contacted by a Pennsylvania State Trooper who told him of a state investigation into Mr. Birdseye for pornography. Clark asked the trooper to keep him informed of developments in the state investigation. State authorities later invited Clark to participate in the July 18, 1986 search of the Birdseye residence, and he was part of the search team that day. Clark testified that while he had examined some of the records seized during the raid, he made no photocopies. He also testified that to the present day he has no knowledge of Millstone Enterprises, Inc. or any of the other respondent corporations. After the raid, Clark made a verbal report to his supervisor but took no further action.

Special Agent Sherlock was dispatched to the state police barracks soon thereafter to review the seized documents and he later

opened up the criminal investigation of William Robert Birdseye. On March 20, 1987, Birdseye was served with a summons directing him to appear before Special Agent Sherlock on april 6, 1987 to give testimony and to bring with him essentially all the financial records of each of the respondent corporations. The respondents' refusal to comply with that summons has ultimately lead to this contempt hearing.

Discussion

I. Civil Contempt Standard

28 U.S.C. § 1826(a) provides that a judge may order confinement "[w]henever a witness in any proceeding before or ancillary to any court . . . of the United States refuses without just cause to comply with an order of the court to testify or provide information . . ." 28 U.S.C.§1826(a). Therefore, "just cause" for a refusal to comply with a court order is a defense to being held in contempt.

In this case, the respondents maintain they have "just cause" not to comply with this court's January 7, 1988 order directing them to comply with Special Agent Sherlock's summons directing William

Robert Birdseye to appear for questioning and to produce corporate records. The respondents claim "just cause" because the IRS's criminal investigation of Birdseye, the summons and the questions to be put to him by Sherlock were derived from wiretaps which violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. [Title III].

II. The State Wiretaps Violated the Federal Wiretapping Statute

In Title III, Congress set out a comprehensive scheme for the regulation of wiretapping and electronic surveillance. 18 U.S.C. §§ 2510 et seq.. Title III authorizes the interception of private wire and oral communications only when federal, state or local law enforcement officials are investigating certain specified crimes and receive prior judicial authorization. 18 U.S.C. § 2516. "Except as expressly authorized in Title III... all interceptions of wire and oral communications are flatly prohibited." Gelbard v. United States, 408 U.S. 41, 47, 92 S.Ct. 2357, 2360, 33 L.Ed.2d 179 (1972). Title III makes it a crime to engage in illegal interception or to disclose information obtained through illegal interceptions. 18 U.S.C. § 2511(1). The victim of an illegal interception, disclosure or use is entitled to recover civil damages. 18 U.S.C. § 2520. Title III also bars the use of the contents of illegally intercepted communications, as

well as evidence derived therefrom ("fruit of the poison tree") "in any trial hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee or other authority of the United States, a State, or a political subdivision thereof..." 18 U.S.C. § 2515. The statute also provides procedures for moving to suppress such evidence in various proceedings. 18 U.S.C. § 2518(9)-(10).

A. States May Not Wiretap to Investigate Non-Violent Prostitution-Related Allegations

The respondents contend that the wiretaps authorized by Judge Zoran Popovich on April 21, 1986 were illegal because they were approved for the investigation of crimes not within the scope permitted by 18 U.S.C. § 2516(2). Section 2516(2) enumerates the offenses whose investigation of wire, oral or electronic communications. It permits a state wiretap for the investigation of:

> murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crimes dangerous to life, limb or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

18 U.S.C. § 2516(2) [emphasis added]. The respondents contend that the state crimes for which the wiretaps were approved to investigate are not offenses within the scope of section 2516(2). They argue that the wiretap was therefore invalid, and any evidence derived

therefrom should not be used in a proceeding before a government body. We agree.

The wiretap authorized on April 21, 1986 was for the investigation of prostitution and related offenses (18 Pa. C.S. § 5902), corrupt organizations (18 Pa. C.S. § 911) and conspiracy with regard to the former offenses (18 Pa. C.S. § 903). None of these crimes are among those specified in section 2516(2). The question remains whether these offenses might have been within the Congress's intendment of "other crimes dangerous to life, limb or property."

The legislative history of section 2516(2) indicates that Congress did not intend to authorize wiretapping for offenses such as prostitution. The drafters of section 2516(2) explained that the list of crimes was to represent a class of major offenses that were either "intrinsically serious or *** [were] characteristic of the operations of organized crime." Senate Report No. 1097, 90th Cong., 2d Sess., U.S. Code Cong. & Admin. News, 1968, p. 2234. With the exception of bribery and gambling, these enumerated crimes all involve harm or the substantial threat of harm to the person, a "limitation [expressly] intended to exclude such offenses as fornication and adultery" from the permissible scope of electronic surveillance. Id. at p. 2187; see People v. Shapiro, 50 N.Y.2d 747,

___, 409 N.E.2d 897, 907 (1980). Prostitution was not within Congress's intention of "other crimes dangerous to life, limb or property," particularly where, as here, there has been no allegations of associated violence or threat of violence.

The Government argues that the Pennsylvania legislature has made findings of fact, stated in the corrupt organizations statute, 18 Pa. C.S. § 911, that it considers prostitution to be a crime dangerous to life or limb. It draws this conclusion because the Pennsylvania legislature included prostitution as a "racketeering activity" within the corrupt organizations statute, see 18 Pa. C.S. § 911(h)(1)(i) [listing as a racketeering activity "Chapter 59 (relating to public decency)"], and the legislature has made the finding that organized crime operates through illegal use of violence, force and intimidation.[1] Furthermore,

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[1] 18 Pa. C.S. § 911 (a), entitled "Findings of fact," states that the General Assembly had found that:

> (1) organized crime is a highly sophisticated, diversified, and widespread phenomenon which annually drains billions of dollars from the national economy by various patterns of unlawful conduct including the illegal use of force, fraud, and corruption;
>
> (* * * *)
>
> (3) the vast amounts of money and power accumulated by organized crime are increasingly used to infiltrate and corrupt legitimate businesses operating within the Commonwealth, together with all of the techniques of violence, intimidation, and other forms of unlawful conduct through which such money and power are derived.

the Government argues, Pennsylvania's wiretap statute permits wiretapping for investigations of violations of the corrupt organizations statute, 18 Pa. C.S. § 5708(a)(5), thereby demonstrating the legislature's concern for the seriousness of that offense.

We cannot agree that by including prostitution among its listing of "racketeering activities" the Pennsylvania legislature can thereby transform prostitution into a crime dangerous to life or limb. While prostitution might be conduct which often may lead to violence, it is not in and of itself dangerous to life or limb. In fact, the Pennsylvania wiretap statute permits interception of wire or oral communications for investigation of violations of the prostitution statute only "where such offense is dangerous to life, limb or property..." 18 Pa. C.S. § 5708 (a)(2). This evidences an awareness on the part of the Pennsylvania legislature that not all prostitution crimes involve violence or physical danger. We do not think that an alleged corrupt organizations violation, where a non-violent prostitution-related offense is the underlying "racketeering activity," may be permitted to bootstrap prostitution-related conduct into the category of crimes dangerous to life or limb.

The Government has not challenged the fact that the federal wiretapping statute preempts state wiretapping provisions. However, the federal statute's grant of enabling power to the states in section 2516 makes it clear that Congress did not intend to supersede state regulation of these matters entirely. The statute recognizes that a state is free to either adopt procedures and standards more restrictive than those of the federal statute or, if it desires, to prohibit wiretapping within its borders altogether. 18 U.S.C. § 2516(2). However, any state law drawn more broadly than the federal statute runs afoul of the supremacy clause. U.S. Const. art. VI, cl. 2; see People v. Shapiro, 409 N.E.2d at 906. "Title III... and the Fourth Amendment of the United States Constitution establish the outer limits of any intrusion into the protected privacy area. State standards which are more protective of this same area must, however, be given effect." United States v. Geller, 560 F. Supp. 1309, 1312 (E.D. Pa. 1983), affm'd 745 F.2d 49 (3d Cir.), cert. denied 105 S.Ct. 786 (1985). State statutes may narrow the scope of permissible state wiretapping, but may not permit state and local authorities to intercept wire and oral communications forbidden by the federal statute. Therefore, to the extent that the Pennsylvania wiretap statute authorizes wiretapping to investigate allegations of non-violent prostitution-related offenses, even if those offenses are categorized as "racketeering activities"

within the corrupt organizations statute, the Pennsylvania wiretap statute contravenes 18 U.S.C. § 2516(2)

The New York Court of Appeals was presented with a quite similar situation in People v. Shapiro. 50 N.Y.2d 747, 409 N.E.2d 897 (1980). Shapiro was an appeal from a criminal conviction for promoting prostitution in the first degree, endangering the welfare of a child, and second and third-degree sodomy. Id. None of the crimes involved violence or forcible coercion. Id. The New York state wiretapping permitted electronic interception for a much more encompassing range of crimes than the federal standard, including the offenses for which the defendant was under investigation and later convicted. Id.

The New York high court held in Shapiro that "the bases for the eavesdropping warrant in this case - allegations of sexual abuse and the promotion of prostitution - however violative of New York criminal law, do not come within the intendment of the Federal statute because they cannot be said to be crime[s] dangerous to life [or] limb." Id., 409 N.E.2d at 907. The decision rejected the contention that the fact that "our own State Legislature has determined that such acts presented a substantial danger to life and limb override[s] the considered judgment of Congress that they did not." Id., 409 N.E.2d

at 907-908. "The [federal] standard may not be expanded beyond the contemplation of the drafters to include within its sweep more subtle forms of personal injury, for example, any deleterious psychic consequences to minors that may result from their participation in such practices." Id., 409 N.E.2d at 908. The court reversed Shapiro's conviction on the grounds that the evidence gleaned from the illegal wiretaps should have been suppressed. Id.

B.

Is An IRS Criminal Investigation Interrogation A "Proceeding" Under Section 2518(10) (a) ?

Section 2518(10)(a) permits an "aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States" to move to suppress the contents of unlawfully intercepted communications, "or evidence derived therefrom." 18 U.S.C. § 2518(10)(a) [emphasis added]. The Government argues that responding to a summons for documents and testimony from an IRS Criminal Division special agent does not amount to a "proceeding" within the meaning of section 2518(10)(a). They therefore take the position that there is no statutory authority to suppress the use of evidence tainted by the invalid state wiretap, leaving the respondents without a "just cause" defense to contempt of court.

Neither the section nor its legislative history define "proceeding" as used in section 2518(10)(a). The Government urges this Court to look to the legislative history for section 2518(9), which requires that notice be given of the intent to use the contents of any intercepted communication at least ten days before a "trial hearing or proceeding." 18 U.S.C. § 2518(9). The Senate Report for section 2518(9) gives this definition for proceedings at which such notice must be given:

> "Proceeding" is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing...

Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, Senate Report 1097, April 29, 1968 U.S. Code Cong. and Admin. News 2112, 2195. This definition of "proceeding" explicitly excludes grand jury hearings, and quite possibly IRS criminal investigatory summonses and interrogations as well.

Gelbard v. United States, the leading United States Supreme Court case on this statute, refutes the Government's argument that Title III offers no relief to the respondents in this case. 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972). Gelbard involved federal grand jury witnesses, two each from California and Pennsylvania, who refused to testify on the grounds that the questions to be put to them were based on information overheard by means of illegal government wiretaps and electronic surveillance. Upon their refusal predicated on Title III, they were jailed for contempt of court. While the Ninth Circuit affirmed the California federal district court's contempt findings, the Third Circuit reversed the Pennsylvania federal district court's holding of Sister Joques Egan, the Pennsylvania grand jury witness, in contempt. In re Grand Jury Proceedings, Harrisburg, Pa., 450 F.2d 199 (3d Cir. 1971) (en banc). The United States

Supreme Court reversed the Ninth Circuit and affirmed the Third Circuit in Gelbard, holding that grand jury witnesses had "just cause" defenses to contempt if they refused to testify when questions would be based on information acquired from illegal wiretaps. Gelbard, supra.

The Gelbard opinion did not explicitly discuss the definition of "proceeding," in fact it did not approach the contempt question in terms of suppression of evidence under section 2518(10)(a). Id. Instead, the Court's ruling relied upon section 2515, which it described as "central to the legislative scheme." Id. at 50, 92 S.Ct. at 2362. Section 2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515 [emphasis added].[2] The respondents here rely on

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[2] The legislative history for section 2515 explains:

> [I]t is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new

both sections 2515 and 2518(10)(a) as providing "just cause" not to be held in contempt for refusing to comply with the IRS summons directing them to produce records and testimony. Gelbard held that "just cause" to refuse to testify based on Title III prohibitions pertained to grand jury hearings. The necessary implication, therefore, is that the Government's preferred definition for "proceeding," which specifically excludes grand juries, would have been held inapplicable by the Gelbard court. We see no reason why the Government's narrow definition for "proceeding" should have any more application to the present case.

The more important question is the scope of "proceeding" in section 2515. 18 U.S.C. § 2515. Section 2515 bars the use of the contents of illegally intercepted communications, as well as evidence derived therefrom, in any "proceeding" before any "department, officer, agency, ...regulatory body... or other authority" of the United States. Id. We think it clear from the plain language of section 2515, and from the broad range of "proceedings" listed therein, that a

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> chapter will sharply curtail the unlawful interception of wire and oral communications.

Senate Report 1097, 90th Cong., 2d Sess., U.S. Code Cong. & Admin. News, p. 2184 (cited in Gelbard at 50 n. 9, 92 S.Ct. at 2362 n. 9).

compelled appearance before an IRS Special Agent of the Criminal Investigations Division conducting a criminal tax investigation, particularly when the summonsed individual is the target of that criminal investigation, is a "proceeding" within the intention of section 2515.

The Government attempts to distinguish Gelbard on the ground that the prosecutors in that case intended to "use" the allegedly tainted evidence during their examination of the witness, whereas "[t]he IRS does not intend to 'use' anything in order to obtain these documents, other than the summons which this Court has already ordered the respondents to comply with." Petitioners' Memorandum of Law in Advance of Contempt Hearing [Government's Memorandum of Law], p. 5.

The first flaw in the Government's analysis is that the "proceeding" in question is not this Court's contempt hearing, but rather the appearance of Mr. Birdseye and the respondents before IRS Special Agent Sherlock. The fact that no tainted evidence needed to be "used" in order to enforce the summons is irrelevant. The pertinent question is the extent to which the exclusionary provisions of sections 2515 and 2518(10)(a) apply to the obligation of the respondents to accede to the IRS's direction that they supply records and testimony to Special Agent Sherlock.

More substantively, the Government ignores the Gelbard Court's concern for the use before Government bodies of the contents of illegally intercepted communication or evidence derived therefrom. Even if Special Agent Sherlock conducted his interrogation of Birdseye without explicitly referring to an excerpt from the illegally wiretapped conversations nor to a single document seized from the tainted searches that followed, the respondents may still rely on the protection of Title III and the Gelbard decision if the requests for documents and testimony were based on information from the illegal wiretap, "or evidence derived therefrom." 18 U.S.C. §§ 2515, 2518(10)(a).[3]

The testimony heard and evidence submitted at the contempt hearing for this case convinces us that the materials seized by state and local police during the raids of the Birdseye residence and businesses were the stimulus and the critical source of information for the IRS's

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3 One of the grand jury witnesses asserting "just cause" in Gelbard, Sister Joques Egan, had been granted transactional immunity with regard to the grand jury investigation for which she refused to testify. Her refusal, therefore, was based exclusively on her privacy interests and not on concerns for self-incrimination.

In the present case, William Robert Birdseye and the respondents have received no such immunity. In fact, the purpose of the summons is to explore Birdseye's criminal liability. In this sense the case at bar present even more compelling circumstances than in Gelbard for concern about the individual's privacy rights and governmental agencies benefitting from the fruits of illegal wiretaps.

criminal investigation into William Robert Birdseye. Prior to these raids, the IRS had merely filed away chance tips received as by-products from other investigations. No single agent was assigned to the investigation until after the tainted state and local searches. When Special Agent Sherlock was first put on the case, it was to sift through the documents seized in the raids. Soon thereafter Sherlock began his own inquiries, ordered copies of income tax returns, opened a criminal investigation by numbering the case, and issued the summons now contested. Special Agent Sherlock himself testified that he believed Birdseye would have been investigated in any event, because the IRS considers involvement in prostitution a "sure sign" of unreported income. We were not convinced of the accuracy of Sherlock's speculation. The fact remains that IRS Agent Blum had been informed of state prostitution allegations against Birdseye as early as November of 1985, yet he took no action and did not open a criminal investigation. Agent Blum, now deceased, cannot testify as to whether he intended to open a criminal investigation of Birdseye, however his report made no mention of unreported income. Sherlock testified that at the time he began looking into Birdseye, there was as yet no information to indicate that there were tax law violations. The evidence at the contempt hearing convinced us that <u>but for</u> the IRS's review of the documents seized by state and local authorities, Special

Agent Sherlock's criminal tax investigation of William Robert Birdseye, initiated only after Sherlock had scrutinized the documents yielded by the raids by state and local authorities and nearly a year after the IRS had learned of alleged prostitution related activities by Birdseye, would not have occurred.

The seized records reviewed by Special Agent Sherlock in late July or early August of 1986, the evidence which caused Sherlock to initiate this criminal investigation, were tainted because the probable cause for the searches was information intercepted by the illegal wiretaps. Our contempt hearing unearthed little to indicate that the summons and possible questions to Birdseye were not based on tainted information, and revealed considerable evidence indicating that they were indeed tainted. As in the Gelbard case, Birdseye and the respondents argue that the summons and the intended questions are a use of the tainted evidence, and any testimony which Birdseye might give in answer to those questions would be tainted evidence "derived from" the illegal wiretap. We agree.

C.

Supreme Court's Application of Title III in Gelbard v. United States

We are guided not only by the letter but also the spirit of the Gelbard decision. In its en banc decision, affirmed by the Supreme Court in Gelbard, the Third Circuit asserted that:

> even if Sister Egan has no statutory defenses to the judgment of civil contempt, the Fourth Amendment would require that the case be remanded to the District Court for a hearing regarding her allegations that the grand jury questions in this case are the fruits of unconstitutional electronic surveillance.

In re Grand Jury Proceedings, Harrisburg, Pa., 450 F.2d 199, 210 (3d Cir.1971). The Supreme Court's affirmance emphasized Congress's concern for protecting individuals from electronic invasions of their privacy by Government, and concluded that "the protection of privacy was an overriding congressional concern." Gelbard at 49, 92 S.Ct. at 2361.[4] The Court quoted the Senate report

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[4] Footnote 10 of the Gelbard decision reiterates the strong privacy concerns underlying Title III:

> Congressional concern with the protection of the privacy of communications is evident also in the specification of what is to be protected. "The proposed legislation is intended to protect the privacy of the communication itself...." [Senate Report No. 1097, U.S. Code Cong. & Admin. News 1968, p. 2178] As defined in Title III, "'contents,' when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence,

which specifically addressed itself to the enforcement, by means of § 2515, of the limitations upon invasions of individual privacy:

> ...Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provisions must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation.

Gelbard at 49-50, 92 S.Ct. at 2362 (quoting Senate Report No. 1097, supra, U.S. Code Cong. & Admin. News, p. 2156 (emphasis in Gelbard).

The Gelbard decision stressed that section 2515's "importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear." Id. at 50, 92 S.Ct. at 2362. "The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called before a grand jury and asked questions based upon that

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> substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8). The definition thus "include[s] all aspects of the communication itself. No aspect, including the identity of the parties, the substance of the communication between them, or the fact of the communication itself, is excluded. The privacy of the communication to be protected is intended to be comprehensive." S.Rep.No. 1097, supra, at 91; U.S. Code Cong. Admin. News, p.2179.

interception." Id. at 50-51, 92 S.Ct. at 2362. We find it no less a subversion of the purposes of Title III when, as here, a victim of an illegal interception is called before an IRS agent requesting documents and asked questions based upon evidence derived from an illegal interception.

The Court went on to explain that "§ 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct." Id. at 51, 92 S.Ct. at 2362-2363. The decision reasoned that:

> [for a court] to order a grand jury witness, on pain of imprisonment to disclose evidence that § 2515 bars in unequivocal terms is both to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents.
>
> In sum, Congress simply cannot be understood to have sanctioned orders to produce evidence excluded from grand jury proceedings by § 2515.

Id. at 51, 92 S.Ct. at 2363. By not allowing § 2515 as a defense to a contempt charge, "disclosure through compelled testimony makes the witness the victim, once again, of a federal crime." Id. The recognition of § 2515 as a defense also "relieves judges of the anomalous duty of finding a person in civil contempt for failing to cooperate with the prosecutor in a course of conduct which, if pursued unchecked, could subject the prosecutor himself to heavy civil and criminal penalties." Id. (quoting In re Grand Jury Proceedings,

Harrisburg, Pa., 450 F.2d at 220 (Rosenn, J., concurring). The Supreme Court finally quoted D.C. Circuit Judge Skelly Wright, who wrote that:

> [F]or a court, on petition of the executive department, to sentence a witness, who is herself the victim of the illegal wiretapping, to jail for refusal to participate in the exploitation of that crime in violation of the explicit command of Section 2515 is to stand our whole system of criminal justice on its head.

Id. at 52, 92 S.Ct. at 2363 (quoting In re Evans, 146 U.S. App.D.C. 310, 323, 452 F.2d 1239, 1252 (1971) (Wright, J., concurring).

The United States Supreme Court's Gelbard decision found that Title III's exclusionary rule protects the privacy of individuals as well as the integrity of the courts by forbidding the judiciary from permitting state and federal law enforcement authorities from exploiting illegal wiretaps or evidence derived therefrom. The Gelbard decision therefore directs that victims of illegal wiretaps, such as the respondents here, should not be compelled by an order of this Court to produce physical and testimonial evidence requested by the Government as a result of the Government's illegal interception of wire and oral communications.

III. Inevitable Discovery And Attenuation Doctrines

The Government argues that, even if the wiretaps were illegal, the Court should nonetheless enforce the IRS summons if it is found that the Government would have acquired the illegally intercepted information without the illegal wiretap. We are not altogether certain of the applicability of the inevitable discovery and attenuation doctrines, corollaries to the judicially created exclusionary rule, to Title III's statutory exclusion policy. We will nonetheless apply these principles to the facts of the case before us.

A.

Inevitable Discovery Doctrine

The inevitable discovery exception to the exclusionary rule is based on the reasoning that the purpose of the exclusionary rule is to put the government in the same position it would have been absent the illegal conduct, but not to put the government in a worse position because of police error or misconduct. See Nix v. Williams, 467 U.S. 431 (1984). In Nix v. Williams, a murder suspect was questioned without his attorney present, in violation of the Sixth Amendment. He led the police to the body of the child he had murdered and that evidence was offered against him at trial. The

Supreme Court affirmed the conviction in partial reliance on the inevitable discovery doctrine, finding that searchers inevitably would have discovered the child's body without the defendant's help. Id. The Court held:

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means -- here the volunteers' search -- then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.

Id. at 443-444. At the hearing, we invited the Government to present evidence to establish by a preponderance that the tainted evidence it used to initiate its criminal tax investigation of Birdseye, and the summons at issue inevitably would have been discovered by lawful means.

The Government attempted to meet this burden by showing that the records sought by the summons were books and records kept in the ordinary course of business and that they would have been requested as a natural step once any criminal tax case was opened. While this may be so, such a showing does not indicate that a criminal tax case inevitably would have been opened to set the chain of events into motion. The Government asserts that Agents Blum and McCoffsky had been working toward a criminal investigation. Yet as we previously noted, there was nothing presented at the contempt

hearing to support this contention aside from Special Agent Sherlock's speculation to that effect. Blum's report contained no mention of possible tax violations, and neither Blum nor McCoffsky ordered copies of either the respondents or the Birdseye's tax returns or took any steps toward opening a case.

Sherlock testified that by the time he had first begun to work on the Birdseye investigation, there was as yet no information to indicate a violation of tax laws aside from the generalized suspicion that prostitution is a "sure sign" of unreported income. Had the state and local authorities not illegally tapped the Birdseye telephones and seized the tainted records, the evidence indicated that it was far from inevitable that the IRS would have opened a criminal tax case against William Robert Birdseye, issued the summons or seized the respondents' records under authority of their own search warrant. We therefore find that the Government has failed to show by a preponderance that the tainted evidence which is the basis for its criminal investigation and the summons for records and testimony would ultimately or inevitably have been discovered absent the violations of Title III.

B.

Attenuation Doctrine

The Government cites Silverthorne Lumber Co. v. United States and the attenuation doctrine to support its contention that despite government wrongdoing in obtaining the books and records, the respondents should nonetheless comply with the summons because the evidence upon which it is based was gained from independent sources. Government's Memorandum of Law, pp. 10-12; see also Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.). In Silverthorne Lumber, Justice Oliver Wendell Holmes denounced the government's position in that case that:

> although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act.

Silverthorne Lumber at 391. Holmes found such a contention reduced the Fourth Amendment "to a form of words." Id. at 392. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all." Id. Holmes clarified that this does not mean that these facts become "sacred and inaccessible," but that:

> If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.

Id. [emphasis added]. Thus in a case decided nearly seventy years earlier yet mirroring the facts we examine today, Justice Holmes reversed the judgment imposing fine and imprisonment for contempt of court against a corporation and its owner for refusal to obey a court order to comply with a grand jury subpoena to produce corporate books and records. Id. If the Government is unable to show an independent source in the present case, as it was unable to do in the Silverthorne Lumber case, we will be bound to reject its application of the attenuation doctrine and refuse, as did Justice Holmes, to hold the respondents in contempt.

The Government has made little or no showing that it had acquired the knowledge of Birdseye's alleged criminal tax violations, or of unreported income by the respondent corporations, from an untainted independent source. In fact, in its Memorandum of Law, pp. 10-12, and in its arguments at the contempt hearing, the Government asserts that because it was state and local authorities who conducted the illegal wiretap and searches, the IRS's receipt of the tainted evidence was "attenuated" from the wrongdoing.

"Simply stated, even if the wiretaps were illegal," the Government argues, "the summons is simply too attenuated from the

illegality to permit the respondents to defy this Court's Order directing them to comply." Government's Memorandum of Law, pp. 11-12. The Government argues by analogy to United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), that the prohibitions on use of tainted evidence in § 2515 should not be applied to an IRS summons. Janis held "that the judicially created exclusionary rule should not be extended to forbid the use in [a] civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign." Janis at 459-460, 96 S.Ct. at ___, 49 L.Ed.2d at 1064. Janis is distinguishable from this case in three respects. First, the IRS was involved in the actual seizure of the tainted evidence to a certain degree through Special Agent Clark's participation in the July 18, 1986 raid on the Birdseye residence. In addition, the affidavit supporting the application for the illegal wiretap included an account of an interview with an alleged prostitute conducted by several law enforcement officials, including IRS Agent Robert Tate and Assistant United States Attorney Judy Giltenboth (the prostitute was a government witness in a separate federal prosecution by Tate and Giltenboth). Second, Janis dealt with "the judicially created exclusionary rule," and not the statutory prohibitions under Title III. Id. The concerns of Gelbard and Title III that the violation of the privacy rights of victims of illegal wiretaps would be

compounded by the use of that evidence in later proceedings is different from the primary deterrence concern underlying the judicially created exclusionary rule. The Janis Court emphasized the absence of significant additional deterrence value when evidence is excluded from a taxpayer's federal civil tax suit when the illegal conduct was undertaken as part of a city criminal investigation.[5] Even if Congress had conceived the scope of Title III's prohibitions to be equivalent to the scope of the judicially created exclusionary rule in 1968,[6] it could not have presaged the Supreme Court's Janis decision eight years after the passage of Title III. Nothing in the statute's legislative history indicates that it intended for the scope of its prohibitions to expand and contract with the fortunes of the judicially created exclusionary rule. Finally, while Janis dealt with the use of evidence in a taxpayer's civil

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5 "[T]he imposition of the exclusionary rule sought in this case is unlikely to provide significant, much less substantial, additional deterrence." United States v. Janis at 458, 96 S.Ct. at ___, 49 L.Ed.2d at 1063.

6 According to the Senate Report, the Title III prohibitions on the use of evidence derived form illegal interceptions:

> largely reflects existing law. It applies to suppress evidence directly or indirectly obtained in violation of the chapter.... There is, however, no intention to change the attenuation rule... Nor generally to press the scope of the suppression role beyond the present search and seizure law.

Senate Report 1097, supra, at 2185 [emphasis added].

tax suit, the summons here was issued in relation to an IRS criminal tax investigation, which we believe raises more significant concerns under Title III, and conceivably more substantial deterrence value as well. We therefore find the holding of Janis inapplicable to Title III and this case.

Because the Government has failed to prove that it had an independent source for the tainted evidence which is the basis for the criminal tax investigation and the summons, and because Janis is inapplicable to this case, we refuse to hold the respondents in contempt of court under an attenuation theory.

IV. Conclusion

After conducting a contempt hearing at which factual evidence and legal arguments were heard by this court, we conclude that the wiretaps which formed the probable cause necessary to authorize searches of the Birdseye residence and corporations were in violation of Title III. Title III prohibits the use of evidence derived from illegal wiretaps, and we find that the IRS's criminal tax investigation of William Robert Birdseye, the summons directing him to produce documents and testimony, and any testimony he and the respondent corporations would be compelled to give would all be derived from

the illegal wiretaps. We also find that the Government has failed to meet its burden of showing that the inevitable discovery or attenuation doctrines have application in this case such that this Court should enforce the IRS's summons despite the violation of Title III. We therefore find that the respondents have "just cause" not to comply with this Court's January 7, 1988 Order directing them to comply with the IRS summons, and we will not hold them in contempt of court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, and JAMES L. SHERLOCK, Special Agent of the Internal Revenue Service,	)	
Petitioners,	)	
v.	)	Civil Action No. 87-2406
MILLSTONE ENTERPRISES, INC., R & R TRUCKING AND TRANSPORTATION, INC., VEE'S BOOK BOUTIQUE, INC., TRUCKERS TRAINING AND TRANSFER, INC., BUSINESSMAN'S MANAGEMENT AND CONSULTING COMPANY, INC., BOULEVARD BOOKSTORE, INC.,	)	
Respondents.	)	

ORDER

AND NOW, this day 18th of April, 1988, after careful consideration of the Petitioners' application for contempt against the Respondents for disobeying this Court's Order dated January 7, 1988, by refusing to appear, testify, and provide the summoned documents which were

ordered to be produced, and upon careful consideration of the pleadings, exhibits, testimony of witnesses, arguments of parties and a full hearing of the matter, for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that the Petitioners', United States of America and James L. Sherlock, Special Agent of the Internal Revenue Service, application for contempt against the Respondents, Millstone Enterprises, Inc., R & R Trucking and Transportation, Inc., Vee's Book Boutique, Inc., Truckers Training and Transfer, Inc., Businessman's Management and Consulting Company, Inc., and Boulevard Bookstore, Inc., is DENIED.

_____

United States District Judge

cm: All parties of record.

TITLE 18, U.S. CODE, § 2516(2)

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply of such judge for, and such judge may grant in conformity with section 2518 of this chapter [18 USCS § 2518] and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or as provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

TITLE 18, PENNSYLVANIA CONSOLIDATED STATUTES § 5708

§ 5708. Order authorizing interception of wire or oral communications

The Attorney General, or, during the absence or incapacity of the Attorney General, a deputy attorney general designated in writing by the Attorney General or the district attorney or, during the absence or incapacity of the district attorney, an assistant district attorney designated in writing by the district attorney of the county wherein the interception os to be made, may make written application to any Superior Court Judge for an order authorizing the interception of a wire or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation involving suspected criminal activities when such interception may provide evidence of the commission of any of the following offenses, or may

provide evidence aiding in the apprehension of the perpetrator or perpetrators of any of the following offenses:

(1) Under this title:

Section 2501 (relating to criminal homicide)
Section 2502 (relating to murder)
Section 2503 (relating to voluntary manslaughter)
Section 2706 (relating to terroristic threats)
Section 2901 (relating to kidnapping)
Section 3121 (relating to rape)
Section 3123 (relating to involuntary deviate sexual intercourse)
Section 3301 (relating to arson and related offenses)
Section 3302 (relating to causing or risking catastrophe)
Section 3502 (relating to burglary)
Section 3701 (relating to robbery)
Section 3921 (relating to theft by unlawful taking or disposition)
Section 3922 (relating to theft by deception)
Section 3923 (relating to theft by extortion)
Section 4701 (relating to bribery in official and political matters)
Section 4702(relating to threats and other improper influence in official and political matters)
Section 5513 (relating to gambling devices, gambling, etc.)
Section 5514 (relating to pool selling and bookmaking)

(2) Under this title where such offense is dangerous to life limb, or property and punishable by imprisonment for more than one year:

Section 3925 (relating to receiving stolen property)
Section 3926 (relating to theft of services)
Section 3927 (relating to theft by failure to make required disposition of funds received)
Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly)
Section 4109 (relating to rigging publicly exhibited contest)
Section 4902 (relating to perjury)
Section 4907 (relating to tampering with witnesses and informants)
Section 4909 (relating to witness or informant taking bribe)
Section 4911 (relating to tampering with public records

or information)

Section 5101 (relating to obstructing administration of law or other governmental function)

Section 5504 (relating to harassment by communication or address)

Section 5902 (relating to prostitution and related offenses)

(3) Under the act of July 22, 1970 (P.L. 513, No. 178), known as the "Pennsylvania Cigarette Tax Act,"[1] where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:

Section 902. Sales of unstamped cigarettes.[2]

Section 903. Possession of unstamped cigarettes.[3]

Section 904. Counterfeiting.[4]

(4) Any offense set forth under section 13(a) of the act of April 14, 1972(P.L. 233, No, 64), known as "The Controlled Substance, Drug, Device and Cosmetic Act,"[5] not including the offense described in clause (31) of section 13(a).

(5) Any offense set forth under the act of November 15, 1972 (P.L. 1227, No, 272).[6]

(6) Any conspiracy to commit any of the offenses set forth in this section.

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[1] 72 P.S. § 3169.101 et seq.

[2] 72 P.S. § 3169.902

[3] 72 P.S. § 3169.903.

[4] 72 P.S. § 3169.904.

[5] 35 P.S. § 780-113, subsec. (a).

[6] Section 3923 of this title.

§ 3922. [Repealed] Findings of fact

The General Assembly finds that:

(1) Organized crime is a highly sophisticated, diversified and widespread phenomenon which annually drains billions of dollars from the national economy by various patterns of unlawful conduct including the illegal use of force, fraud and corruption;

(2) Organized crime exists on a large scale within the Commonwealth of Pennsylvania, engaging in the same patterns of unlawful conduct which characterize its activities nationally;

(3) The vast amounts of money and power accumulated by organized crime are increasingly used to infiltrate and corrupt legitimate businesses operating within the Commonwealth, together with all of the techniques of violence, intimidation and other forms of unlawful conduct through which such money and power are derived;

(4) In furtherance of such infiltration and corruption, organized crime utilizes and applies to its unlawful purposes laws of the Commonwealth of Pennsylvania conferring and relating to the privilege of engaging in various types of business and designed to insure that such businesses are conducted in furtherance of the public interest and the general economic welfare of the Commonwealth;

(5) Such infiltration and corruption provide an outlet for illegally obtained capital, harm innocent investors, entrepreneurs, merchants and consumers, interfere with free competition, and thereby constitute a substantial danger to the economic and general welfare of the Commonwealth of Pennsylvania; and

(6) In order to successfully resist and eliminate this situation, it is necessary to provide new remedies and procedures.

§ 3923. [Repealed] Definitions

(1) "Racketeering activity" means (A) any act which is indictable under any of the following provisions of the act of June 24,

1939 (P.L. 872) known as "The Penal Code":[1] section 303 (relating to bribery),[2] section 304 (relating to corrupt solicitation),[3] section 318 (relating to extortion),[4] section 322 (relating to perjury),[5] section 324 (relating to hindering witnesses),[6] section 328 (relating to falsification of matters within jurisdiction of State agencies),[7] sections 512, 513, and 515 through 517 (relating to prostitution),[8] sections 601 through 609 (relating to gambling), [9] sections 614 and 615 (relating to bribery in athletic contests),[10] section 667 (relating to bribery of employees),[11] sections 669 and 670 (relating to coercion and intimidation of employes),[12] section 683 (relating to influencing officers of corporations, municipalities and public institutions),[13]

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1 Section 4101 et seq. of this title.

2 Section 4303 of this title.

3 Section 4304 of this title.

4 Section 4318 of this title.

5 Section 4322 of this title.

6 Section 4324 of this title.

7 Section 4328 of this title.

8 Sections 4512, 4513, 4515 to 4517 of this title.

9 Sections 4601 to 4609 of this title.

10 Sections 4614, 4615 of this title.

11 Section 4657 of this title.

12 Section 4669, 4670 of this title.

13 Section 4683 of this title.

section 701 (relating to murder),[14] sections 704 and 705 (relating to robbery),[15] section 723 (relating to kidnapping),[16] sections 801 through 806 (relating to blackmail),[17] sections 806.2 through 806.9 (relating to extortionate and usurious credit transactions),[18] sections 817 through 819 (relating to receiving and transporting stolen property),[19] sections 822 through 831 (relating to embezzlement),[20] and sections 905 through 908 (relating to arson),[21] (B) any offense indictable under section 20(d), of the act of September 26, 1961 (P.L. 1664), known as "The Drug, Device and Cosmetic Act" (relating to the sale and dispensing of narcotic drugs);[22] or (C) any conspiracy to commit any of the offenses set forth in subclauses (A) and (B) of this clause. Any act which otherwise would be considered racketeering activity by reason of the application of this clause, shall not be excluded from its application solely because the operative acts took place outside the jurisdiction of this Commonwealth, if such acts would have been in violation of the law of the jurisdiction in which they occurred.

(2) "Person" means any individual or entity capable of holding a legal or beneficial interest in property;

(3) "Enterprise" means any individual, partnership,

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14 Section 4701 of this title.

15 Sections 4704, 4705 of this title.

16 Section 4723 of this title.

17 Sections 4801 to 4806 of this title.

18 Sections 4806.2 to 4806.9 of this title.

19 Sections 4817 to 4819 of this title.

20 Sections 4822 to 4831 of this title.

21 sections 4905 to 4908 of this title.

22 35 P.S. § 780-20.

corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, engaged in commerce;

(4) "Pattern of racketeering activity" refers to a course of conduct requiring two or more acts of racketeering activity, one of which occurred after the effective date of this act;

(5) "Racketeering investigator" means an attorney, investigator or investigative body so designated in writing by the Attorney General and charged with the duty of enforcing or carrying into effect the provisions of this act;

(6) "Racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this act or of any order, judgment, or decree of any court duly entered in any case or proceeding arising under this act;

(7) "Documentary material" means any book, paper, record, recording, tape, report, memorandum, written communication, or other document relating to the business affairs of any person or enterprize.

TITLE 18. PENNSYLVANIA CONSOLIDATED STATUTES § 911

§ 911. Corrupt organizations

(a) Findings of fact. - The General Assembly finds that:

(1) organized crime is a highly sophisticated, diversified, and widespread phenomenon which annually drains billions of dollars from the national economy by various patterns of unlawful conduct including the illegal use of force, fraud, and corruption;

(2) organized crime exists on a large scale within the Commonwealth of Pennsylvania, engaging in the same patterns of unlawful conduct which characterize its activities nationally;

(3) the vast amounts of money and power accumulated by organized crime are increasingly used to infiltrate and corrupt legitimate businesses operating within the Commonwealth, together

with all of the techniques of violence, intimidation, and other forms of unlawful conduct through which such money and power are derived;

(4) in furtherance of such infiltration and corruption, organized crime utilizes and applies to its unlawful purposes laws of the Commonwealth of Pennsylvania conferring and relating to the privilege of engaging in various types of business and designed to insure that such businesses are conducted in furtherance of the public interest and the general economic welfare of the Commonwealth;

(5) such infiltration and corruption provide an outlet for illegally obtained capital, harm innocent investors, entrepreneurs, merchants and consumers, interfere with free competition, and thereby constitute a substantial danger to the economic and general welfare of the Commonwealth of Pennsylvania; and

(6) in order to successfully resist and eliminate this situation, it is necessary to provide new remedies and procedures.

(b) **Prohibited activities.-**

(1) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity in which such person participated as a principal, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise: Provided, however, That a purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issue held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity after such purchase, do not amount in the aggregate to 1% of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer: Provided, further, That if, in any proceeding involving an alleged investment in violation of this subsection, it is established that over half of the defendant's aggregate income for a period of two or more years immediately preceding such investment was derived form a pattern of racketeering activity, a rebuttable presumption shall arise that such investment included income derived from such pattern of racketeering activity.

(2) It shall be unlawful for any person through a pattern of

racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

(3) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

(4) It shall be unlawful for any person to conspire to violate any of the provisions of paragraphs (1), (2) or (3) of the subsection.

(h) Definitions. - As used in this section:

(1) "Racketeering activity" means:

(i) any act which is indictable under any of the following provisions of this title:

Chapter 25 (relating to criminal homicide)
Section 2706 (relating to terroristic threats)
Chapter 29 (relating to kidnapping)
Chapter 33 (relating to arson, etc.)
Chapter 37 (relating to robbery)
Chapter 39 (relating to theft and related offenses)
Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly)
Section 4109 (relating to rigging publicly exhibited contest)
Chapter 47 (relating to bribery and corrupt influence)
Chapter 49 (relating to perjury and other falsification in official matters)
Section 5512 through 5514 (relating to gambling)
Chapter 59 (relating to public indecency)

(ii) any offense indictable under section 13 of the act of April 14, 1972 (P.L. 233, No. 64), known as "The Controlled Substance, Drug Device and Cosmetic Act" (relating to the sale and dispensing of narcotic drugs);

(iii) any conspiracy to commit any of the offenses set forth in subparagraphs (i) and(ii) of this paragraph; or

(iv) the collection of any money or other property in full or partial satisfaction of a debt which arose as the result of the lending of money or other property at a rate of interest exceeding 25% per annum or the equivalent rate for a longer or shorter period, where not otherwise authorized by law.

Any act which otherwise would be considered racketeering activity by reason of the application of this paragraph, shall not be excluded from its application solely because the operative acts took place outside the jurisdiction of this Commonwealth, if such acts would have been in violation of the law of the jurisdiction in which they occurred.

(2) "Person" means any individual or entity capable of holding a legal or beneficial interest in property.

(3) "Enterprise" means any individual, partnership, corporation , association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, engaged in commerce.

(4) "Pattern of racketeering activity" refers to a course of conduct requiring two or more acts of racketeering activity one of which occurred after the effective date of this section.

(5) "Racketeering investigator" means an attorney, investigator or investigative body so designated in writing by the Attorney General and charged with the duty of enforcing or carrying into effect the provisions of this section.

(6) "Racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this section or of any order, judgment, or decree of any court duly entered in any case or proceeding arising under this section.

(7) "Documentary material" means any book, paper, record, recording, tape, report, memorandum, written communication, or other document relating to the business affairs of any person or enterprise.